

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

77-1438

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

against

RUSSELL BUFALINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT BUFALINO'S APPENDIX



WILFRED L. DAVIS
Attorney for Appellant
Russell Bufalino
67 Wall Street
New York, New York 10005

ROBERT B. FISKE, Jr.
United States Attorney
United States Court House Annex
1 St. Andrews Plaza
New York, New York 10007

PAGINATION AS IN ORIGINAL COPY

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A 1

CERTIFIED COPY OF DOCKET ENTRIES

BUFALINO, RUSSELL

0849

10 26

76 0982 01

0208

***04**

U.S. FILE SECTION
18:371
18:894

OFFENSES CHARGED
Consp. to commit extortion
Extortion to collect debt

ORIGINAL COUNTS
1
2

U.S. MAG
CASE NO.

DATE • RELEASE

☐ AMT ☐ Fugitive
Denied Set ☒ Pers Recog
☐ JPSA
\$ **50,000** conditions
Date ☐ 10% Dep
☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 3rd Party Cust

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began	High Risk Date	Information	Trial Set For
Summons Served	Indict Waived	11-4-76	5-31-77
First Appearance	In Charge District	11-4-76	8-1-77
	Superseding Indict/Info	Final Plea	8-10-77
			8-10-77

SENTENCE
Disposition of Charges
8-10-77
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On All Charges
☐ On Lesser Offenses
☐ WOP: ☐ WP
☐ On Government's Motion

MAGISTRATE

DATE	INITIAL/NO	OUTCOME
Search Warrant	Issued	☐ DISMISSED HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
Summons	Issued	
Arrest Warrant	Served	☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT ELDO
COMPLAINT		
OFFENSE (in Complaint)		

U.S. Attorney or Asst.

ATTORNEYS

Defense ☐ CJA ☐ Ret ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Barbara S. Ambler
791-1154

301

* Show last names and suffix numbers of other defendants on same indictment/information.

Sparber-02, Jacobs-03, Lapadura-04

EXCLUDABLE DELAY
(a) (b) (c) (d)

DATE	(DOCUMENT NO)	PROCEEDINGS
10-26-76		Filed Indictment & Ordered sealed. B/W Ordered..Gagliardi, J.
10-27-76		Indictment Ordered unsealed,.....Gagliardi, J. B/W Issued. 2- 10-27-76-M-1
11-4-76		Deft. (atty. Wilfred L. Davis) pleads not guilty. Bail fixed at \$50,000 PRB. Case assigned to Lasker, J. for all purposes.Cooper, J.
11-4-76		Filed PRB in the Amount of \$50,000.00 Unsecured
12-8-76		Filed Dfts. Notice of Motion & supporting affdvt. for order for relief;whether of not dft. was subject to authorized or unauthorized electronic,etc. if so times & places activities took place,etc. Ret. Sine Die.
12-28-76		Filed Govts. Affdvt. in response to various pre trial motions made by dfts.
12-28-76		Filed Govts. Memorandum of Law.

A 2
Certified Copy of Docket Entries

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
	(DOCUMENT NO.)		Interval between events (a)	Start Date (b)	End Date (c)	Days (d)
1-21-77	Filed Govts. Affidvt. in support of Govts. request for adjournment of trial.					
3/4/77	Filed Govts. Notice of Readiness for trial on or after 5/15/77.					
4-4-77	Filed Dfts. Notice of Motion & supporting affidavit, for an order to suppress evidence, dismiss indictment, etc. Ret. Sine Die.					
4-4-77	Filed Dfts. Memorandum of law in support of motion on behalf of dft. Bufalino.					
4-12-77	Filed Govts. Memorandum of Law.					
4-12-77	Filed Govts. Affidvt. in opposition to motions of dfts. R. Bufalino EXH & M. Sparber to suppress tape recordings, etc.					
5-6-77	Filed letter to Judge Lasker from Hugh Anthony Levine.					
5-18-77	Filed Post Hearing Memorandum on Behalf of Dft. Bufalino.					
5-19-77	Filed Govts. Proposed Findings of Fact & Conclusions of law.					
5-25-77	Filed Memo. to All Counsel from Judge Lasker. Re: Trial will Commence @ 10 AM on 5/31/77 in Rm. 2703 as indicated.....Lasker J. (mn)					
5-31-77	Filed Memorandum Order . Govts. motion for an adjournment has been adjourned from May 31, 1977 to Aug. 1, 1977 essential witness unavailable as indicated..... Trial will commence on 10:00 on 8-1-77 in courtroom 301..... Lasker J. (mn)	3	5-31-77	8-1-77	M	62
6-13-77	Filed Opinion #46004. The motions to suppress due to the destruction of the Kel tapes are denied without prejudice to renewal at trial in the event the testimony justifies such a course. Etc. The other motions are denied..... Lasker J. (mn)					
8-1-77	Trial begun dft. present with atty. Wilfred L. Davis					
8-2-77	Trial cont'd					
8-3-77	"					
8-4-77	"					
8-5-77	"					
8-8-77	"					
8-10-77	Trial cont'd and concluded; dft. found guilty on Cts. 1 & 2 Bail changed to \$10,000 cash secured by \$50,000 PRB to be paid by Mon. 8-15-77 at 4:00 p.m. Sentence set for 9-23-77 at 10: a.m. Lasker, J.					
Cont'd						
FINE AND RESTITUTION PAYMENTS						
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER	

Certified Copy of Docket Entries

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

BUFALINO, RUSSELL

Page #3

76 982

01

Yr. | Docket No. | Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
8-15-77	Filed def't's affdvt. stating his assets in refering to his bail status.				
8-15-77	Filed \$50,000 PRB secured with deed to property of Russell and Angelo Bufalino, given to U.S. Atty. Deft's address: 304 Dorrantz St., Kingston, Pa., co-signer: Angelo Bufalino, address: 133 Pine St. Pittston, Pa.				
8-22-77	Filed summons with marshal's return served on Howard Mott by Roland L. Frink on 8-4-77.				
8-24-77	Filed transcript of record of proceedings, dated April 25, 1977, 8-1-77, 8-2-77, 8-3-77, 8-4-77, 8-5-77-8-8-77, 8-10-77, 8-5-77				
10-19-77	Filed Gov't sentencing memorandum				
10-26-77	Filed Notice of Appeal on Judgment of conviction entered on 10-21-77. (copies issued) (copies mailed to Wilfred L. Davis 67 Wall St., N.Y.; Charles P. Gelso of counsel, 1200 United Penn Bank, Wilkes Barre, Pa.) (Robert B. Fiske, U.S. Atty)				
10-26-77	Filed letter dated 2-10-77 submitted by def't's atty. Wilfred L. Davis.				
10-28-77	Filed Transcript of record of proceedings, dated 10/31/77				
10-31-77	Filed letter of Wilfred Davis to Judge Lasker dtd: 5-19-77				
10-31-77	Filed letter of Barbara Jones to Judge Lasker dtd: 5-16-77				
10-31-77	Filed affidavit of Barbara Jones in support of govt's request for second adjournment.				
10-21-77	Filed Judgment and Probation/Commitment, # 78,209 atty. (Arnold E. Wallach) present : The def't. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of: FOUR (4) YEARS ON Ct. 1 and the def't. is fined the sum TEN THOUSAND DOLLARS (\$10,000) to be paid within NINETY(90) DAYS or the def't. to stand committed . Imposition of sentence of imprisonment is suspended on Ct. 2 and the def't. is placed on probation for a period of FIVE (5) YEARS to commence upon the expiration of the term of custody and is fined the sum of TEN THOUSAND DOLLARS (\$10,000) to be paid within NINETY (90) DAYS or the def't. to stand committed.....Lasker, J. Issued Commitment 10-31-77				
11-1-77	Filed stipulation designating certain documents to become part of the record on appeal.				

A 4
Certified Copy of Docket Entries

ED STATES DISTRICT COURT
 JINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11-10-77	Filed Notice of certification and transmittal of original record to USCA.				
1-18-77	Filed Gov't Notice of Motion to require deposit of Fines or Posting of Bond pending appeal. Returnable 12-3-77, Rm. 2903				
11-28-77	Filed duplicate original of transcript of record of proceeding's dated, May 5, 1977.				
11-28-77	Filed transcript of record of proceeding's dated, May 9, 1977.				
1-29-77	Filed notice of certification and transmittal of 2nd supplemental record to USCA.				
12-2-77	Filed duplicate stip. designating exhibits to become part of the record on appeal.				

A 5
INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

INDICTMENT

- v - :

76 Cr.

RUSSELL BUFALINO, MICHAEL :
SPARBER, HERBERT JACOBS and :
JOSEPH LAPADURA, a/k/a Lefty, :

Defendants. :

- - - - - x

COUNT ONE

The Grand Jury charges:

1. From in or about February, 1976, up to and including the date of the filing of this indictment, in the Southern District of New York, RUSSELL BUFALINO, MICHAEL SPARBER, HERBERT JACOBS and JOSEPH LAPADURA a/k/a Lefty, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with other persons whose identities are unknown to the Grand Jury, to violate Section 894 of Title 18, United States Code.

2. It was a part of said conspiracy that the defendants, RUSSELL BUFALINO, MICHAEL SPARBER, HERBERT JACOBS and JOSEPH LAPADURA a/k/a Lefty, unlawfully, wilfully and knowingly would participate in the use of extortionate means, involving the use of express and implicit threats of the use of violence and other criminal means, to cause harm to the person, reputation and property of Jack Napoli, in order to collect and attempt to collect

from Jack Napoli extensions of credit, made by the defendant HERBERT JACOBS and to punish the said Jack Napoli for the non-repayment of said extensions of credit.

3. Among the means whereby the defendants and their co-conspirators would and did carry out the aforesaid conspiracy were the following:

a) The defendant, HERBERT JACOBS, having sold certain jewels on credit to Jack Napoli in the approximate sum of \$25,000.00, would and did agree with the defendants RUSSELL BUFALINO, MICHAEL SPARBER and JOSEPH LAPADURA a/k/a Lefty, that the defendants BUFALINO, SPARBER and LAPADURA would use physical violence and threats of physical violence to the person of Jack Napoli to collect the said \$25,000.00 on behalf of the defendant HERBERT JACOBS.

b) The defendants RUSSELL BUFALINO, MICHAEL SPARBER and JOSEPH LAPADURA a/k/a Lefty would and did communicate with Jack Napoli and would and did threaten him and others with physical harm in order to attempt to collect approximately \$25,000.00 owed by Jack Napoli to the defendant HERBERT JACOBS.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and their co-conspirators in the Southern District of New York, committed and caused to be committed the following overt acts, among others:

1. In or about March, 1976, the defendant HERBERT JACOBS had a telephone conversation with Jack Napoli.

A 7
Indictment

2. On or about March 31, 1976, the defendants MICHAEL SPARBER, HERBERT JACOBS and JOSEPH LAPADURA a/k/a Lefty met with Jack Napoli at the Vesuvio Restaurant, 163 West 48th Street, New York City, New York.

3. On or about April 5, 1976, the defendants MICHAEL SPARBER, RUSSELL BUFALINO and JOSEPH LAPADURA a/k/a Lefty met with Jack Napoli at Johnnie's Restaurant, 135 West 45th Street, New York City, New York.

4. On or about April 12, 1976, the defendant RUSSELL BUFALINO met with Jack Napoli at the Vesuvio Restaurant, 163 West 48th Street, New York City, New York.

5. On or about April 16, 1976, the defendant MICHAEL SPARBER met with Jack Napoli at the Vesuvio Restaurant, 163 West 48th Street, New York City, New York.

6. On or about April 20, 1976, the defendant MICHAEL SPARBER met with Jack Napoli at the Vesuvio Restaurant, 163 West 48th Street, New York City, New York.

(Title 18, United States Code, Section 894)

COUNT TWO

The Grand Jury further charges:

From in or about February, 1976, up to and including on or about April 21, 1976, in the Southern District of New York, RUSSELL BUFALINO, MICHAEL SPARBER, HERBERT JACOBS and JOSEPH LAPADURA a/k/a Lefty, the defendants, unlawfully, wilfully and

knowingly did use extortionate means, to wit, means involving the use and express and implicit threats of the use of violence and other criminal means to cause harm to the person, reputation and property of Jack Napoli in order to collect and attempt to collect extensions of credit from the said Jack Napoli and to punish the said Jack Napoli for the non-repayment thereof.

(Title 18, United States Code, Sections 894 and 2)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

UNITED STATES OF AMERICA	:	<u>AFFIDAVIT</u>
-v-	:	
RUSSELL BUFALINO, et. al.,	:	76 Cr. 982
	:	(MEL)
Defendants.	:	

- - - - -x

Barbara S. Ambler, being duly sworn deposes and says:

1. I am a Special Attorney, United States Department of Justice assigned to the Organized Crime (Strike Force Unit of the office of the United States Attorney, Southern District of New York. As such I am familiar with the facts and proceedings in the above-captioned case.

2. I make this affidavit in support of the Government's request for an adjournment of the trial date in the above matter, for the reason that Geraldine Napoli will be unavailable to testify for the Government at that time.

As the Court is aware the date of March 28, 1977, was set for the trial of this case at a pre-trial conference held on November 18, 1976.

3. During the week of January 10, 1977, I learned that Mrs. Napoli is expected to deliver a child on March 29,

1977, I also received a note * from her obstetrician advising that she should not travel for a six week period after the birth.

4. The Government's case consists of the testimony of Jack Napoli, that of his wife Geraldine Napoli and certain tape recordings obtained with Napoli's consent. Geraldine Napoli's testimony will be principally concerned with an unrecorded meeting between Jack Napoli and the defendants Michael Sparber and Russell Bufalino, at which she was present and which is the subject of overt act number three. Her testimony strongly corroborates that of Jack Napoli with respect to the existence of the extortion conspiracy and the use of threats of violence to obtain his repayment of a debt. Further, defense counsel will be advised shortly by letter, of detailed information with respect to Jack Napoli, which will include prior arrests and ^{other} materials. The Government anticipates that Mr. Napoli's credibility will be hotly contested at trial. Gerald Napoli is the Government's only other live witness (other than FBI agents who will attest

*A copy of this note has been appended to the Court's copy of this affidavit. For security reasons, in that it would disclose the location of Mrs. Napoli, I have not attached copies to defense copies of this affidavit. I have, however, attached a copy of the text of the note to copies sent to defense counsel

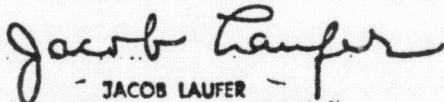
to the authenticity and reliability of the tapes) who will testify to the substance of the charges in this indictment.

5. In the Government's view Geraldine Napoli is an essential and indeed critical witness if the trial jury is to be able to make a true and just determination of the facts of this case.



BARBARA S. AMBLER
Special Attorney

Sworn to before me this
20th day of January, 1977.



JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977

A 12

FILED COPY OF LETTER FROM WILFRED L. DAVIS TO JUDGE LASKER
DATED FEBRUARY 10, 1977

WILFRED L. DAVIS & STEPHEN DAVIS
COUNSELLORS AT LAW
250 BROADWAY
NEW YORK, N. Y. 10007
(212) 677-8640

WILFRED L. DAVIS
STEPHEN DAVIS
JOY M. HOLZ

CABLE ADDRESS
WILDAVLANS NEW YORK

February 10, 1977

Hon. Morris E. Lasker
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: U.S. -v- Bufalino et al
76-CR-982 (MEL)

Dear Judge Lasker:

I cannot consent to the stipulation submitted by Assistant United States Attorney Barbara Ambler setting forth the proposed testimony of Ms. Geraldine Napoli as the facts set forth therein are not correct. Additionally, if Ms. Napoli testifies, I will want the opportunity to cross examine her.

I also do not consent to the United States Attorney's request for an adjournment of the trial date presently set for March 28, 1977

Respectfully,

Wilfred L. Davis
WILFRED L. DAVIS

WLD:vv

FILED COPY OF JUDGE LASKER'S MEMORANDUM TO COUNSEL
DATED FEBRUARY 11, 1977

UNITED STATES DISTRICT COURT

Memorandum

TO : All counsel

DATE: February 11, 1977

FROM : Judge Lasker

SUBJECT: United States v. Bufalino, et. al. 76 Cr. 982

The trial date in this case has been adjourned from March 28, 1977 to May 31, 1977, on the government's motion for an adjournment to a time after May 15 so that one of its two principal witnesses, Geraldine Napoli, will be able to testify. This adjournment is warranted and the time period involved excludable from the 180-day period within which the defendants must be brought to trial under 18 U.S.C. §3161(h)(3)(A). As Ms. Ambler's affidavit demonstrates, Geraldine Napoli is both an "essential witness" and "unavailable" within the meaning of the statute, since her whereabouts are known but her presence cannot be obtained by due diligence, in light of her medical condition...

Trial will commence at 10:00 a.m. on May 31
in Courtroom 2703.

Under Seal

A 14

FILED COPY OF GOVERNMENT'S NOTICE OF READINESS FOR TRIAL
DATED MARCH 4, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA

: NOTICE OF READINESS
: FOR TRIAL

- v -

RUSSELL BUVALINO,
HERBERT JACOBS,
MICHAEL SPARBER and
JOSEPH LAPADULA,
Defendant.

:
: 76 Cr. 982
:

----- x
S I R S :

PLEASE TAKE NOTICE that the United States will
be ready for trial in this case as soon as the matter can
be reached by the Court on or after **May 13, 1977**
subject to receiving five days' advance notice of the
actual date for trial.

Dated: New York, New York

March 4 1977

Yours, etc.,

ROBERT B. VISKE, JR.

United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By: _____

~~KARRARA S. AMBLER~~
Assistant United States Attorney

A 15

LETTER DATED MAY 16, 1977 ANNEXED TO AFFIDAVIT OF
ASSISTANT UNITED STATES ATTORNEY JONES

BSJ:ma

May 16, 1977

BY HAND

The Honorable Morris E. Lasker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square - Room 1903
New York, NY 10007

Re: United States v. Russell Bufalino,
et al., 76 Cr. 982

Dear Judge Lasker:

This letter is to request a second adjournment of the trial date in the above matter. As explained in the attached affidavit, Geraldine Napoli, a principal Government witness, will be unavailable to testify the week of May 31, 1977, the date currently scheduled for trial.

In reviewing the Government's case I have again concluded, as I did in January of this year, that Geraldine Napoli is an essential witness. As such, of course, a further period of delay remains excludable under Title 18, United States Code, Section 3161(h)(3)(A).

I have been advised by Mrs. Napoli's doctor, that if her condition can be stabilized with medication, she will be able to travel to New York to testify as early as June 12, 1977. The doctor also advised me, however, that if the medication is ineffective surgery may be required. This decision is to be made after an examination of Mrs. Napoli on May 27, 1977. Until this examination, it is impossible for the Government to specify the length of

Letter dated May 16, 1977

The Honorable Morris E. Lasker
Page Two

- 2 -

the adjournment requested, although it may be as short
as two weeks.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
BARBARA S. JONES
Assistant United States Attorney
(212) 791-0043

Enc: 2

cc: Wilfred L. Davis, Esq.
250 Broadway
New York, NY 10007

Harold O.N. Frankel, Esq.
253 Broadway
New York, NY 10007

William J. Gilbreth, Esq.
c/o Fish & Neave
277 Park Avenue
New York, NY 10017

John Iannuzzi, Esq.
233 Broadway
New York, NY 10007

FILED AFFIDAVIT OF ASSISTANT UNITED STATES
ATTORNEY JONES DATED MAY, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

- v - :

AFFIDAVIT

RUSSELL BUFALINO, et al., : 76 Cr. 982 (MEL)

Defendants. :

- - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

BARBARA S. JONES, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in
the office of Robert B. Fiske, Jr., United States Attorney
for the Southern District of New York. As such I am in charge
of the prosecution of the above-captioned case.

2. I make this affidavit in support of the
Government's request for a second adjournment of the trial
date in the above matter, for the reason that Geraldine Napoli
will be unavailable to testify for the Government the week of
May 31, 1977.

3. On May 13, 1977, I spoke with the gynecologist
who also delivered Mrs. Napoli's baby in March of this year.
This doctor advised me that Mrs. Napoli is hemorrhaging

internally as a result of the birth, and that unless this bleeding can be controlled an airplane flight to New York would be extremely hazardous to her and might even result in her death. Furthermore, Mrs. Napoli's present condition requires her to remain in bed most of the time. The doctor also advised me that a decision would be made on May 27, 1977, after another examination of Mrs. Napoli, as to whether she could travel by mid-June or would require surgery. I am expecting a letter from the doctor to confirm this information by the end of this week.

4. The Government's case consists of the testimony of Jack Napoli, that of his wife Geraldine Napoli and certain tape recordings obtained with Napoli's consent. Geraldine Napoli's testimony will be principally concerned with an unrecorded meeting between Jack Napoli and the defendants Michael Sparber and Russell Bufalino, at which she was present and which is the subject of overt act number three. Her testimony strongly corroborates that of Jack Napoli with respect to the existence of the extortion conspiracy and the use of threats of violence to obtain his repayment of a debt. Further, defense counsel have been advised of detailed information with respect to Jack Napoli,

including his prior arrests and other "Brady" type materials. The Government anticipates that Mr. Napoli's credibility will be hotly contested at trial. Geraldine Napoli is the Government's only other live witness (other than FBI agents who will attest to the authenticity and reliability of the tapes) who will testify to the substance of the charges in this indictment.

5. In the Government's view, Geraldine Napoli is an essential and indeed critical witness if the trial jury is to be able to make a true and just determination of the facts of this case.

BARBARA S. JONES
Assistant United States Attorney

Sworn to before me this
day of May, 1977

A 20

FILED WILFRED L. DAVIS' LETTER OF MAY 19, 1977 TO
JUDGE LASKER OBJECTING TO FURTHER POSTPONEMENT OF
TRIAL AND REQUEST DISMISSAL AS DELAY VIOLATES
DEFENDANT'S RIGHT TO A SPEEDY TRIAL

WILFRED L. DAVIS & STEPHEN DAVIS
COUNSELLORS AT LAW
250 BROADWAY
NEW YORK, N. Y. 10007
(212) 227-6640

WILFRED L. DAVIS
STEPHEN DAVIS
JOY M. HOLZ

CABLE ADDRESS
WILDAVLAW NEW YORK

May 19, 1977

The Honorable Morris E. Lasker
United States District Judge
Southern District Court
United States Courthouse
Foley Square - Room 1903
New York, New York 10007

Re: United States v. Russell Bufalino et al.
76 Cr. 982

Dear Judge Lasker:

Yesterday I received a letter dated May 16, 1977 and affidavit from Assistant United States Attorney Barbara Jones, restating the request she advised previously by phone she was making for an adjournment of the trial date from May 31, 1977 to an unspecified future date. I advised both Ms. Jones and Peter Paden of your staff that I opposed any adjournment of the trial date in this case.

The original trial date of March 28, 1977, was previously adjourned over my objection.

Ms. Jones in her letter of May 16, 1977 states she is requesting an adjournment of undetermined length because Geraldine Napoli is unable to travel and it is presently not possible to specify the length of her disability. She states that the adjournment sought may be "as short as two weeks" or as appears from the facts set forth in her affidavit and letter, it could be considerably longer.

continued...

A 21

*Filed Wilfred L. Davis' Letter of May 19, 1977 to
Judge Lasker objecting to further Postponement of
Trial and Request Dismissal as Delay Violates
Defendant's Rights to a Speedy Trial*

WILFRED L. DAVIS & STEPHEN DAVIS

The Honorable Morris E. Lasker

Page Two

Defendants herein were arraigned on November 4, 1976. The presently scheduled trial date of May 28, 1977 is in itself more than 180 days after the date of arraignment, contrary to Rule 5 of this Court.

Delay of the commencement of the trial violates defendant's right to a speedy trial and request is hereby made for dismissal of the indictment.

Very truly yours,

Wilfred L. Davis
WILFRED L. DAVIS

WLD:vv

cc: Barbara S. Jones, Esq.
Assistant United States Attorney

A 22

LETTER DATED MAY 20, 1977 FORWARDING COPY OF MRS. NAPOLI'S
GYNECOLOGIST'S REPORT ANNEXED TO AFFIDAVIT OF
ASSISTANT UNITED STATES ATTORNEY JONES



ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF NEW YORK

ONE ST. ANDREW'S PLAZA

NEW YORK, NEW YORK 10007

BSJ:rs

May 20, 1977

Wilfred L. Davis, Esq.
250 Broadway
New York, New York 10007

Harold O.N. Frankel, Esq.
253 Broadway
New York, New York 10007

William J. Gilbreth, Esq.
c/o Fish & Neave
277 Park Avenue
New York, New York 10017

John Iannuzzi, Esq.
233 Broadway
New York, New York 10007

Re: United States v. Russell Bufalino, et al.
76 Cr. 982

Gentlemen:

Enclosed please find a copy of the letter from
Mrs. Napoli's gynecologist which I referred to in my
papers of May 16, 1977. Those portions which have been
deleted refer only to Mrs. Napoli's new identity and her
present whereabouts. The Court has been provided with



A 23

Letter dated May 20, 1977 forwarding Copy of
Mrs. Napoli's Gynecologist's Report

BSJ:rs

Wilfred L. Davis, Esq.
Harold O.N. Frankel, Esq.
William J. Gilbreth, Esq.
John Iannuzzi, Esq.

-2-

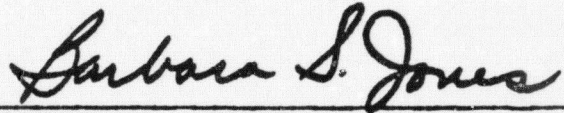
May 20, 1977

an unexcised copy of the letter.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By:



BARBARA S. JONES
Assistant United States Attorney
212-791-0043

Enc: As Stated

CC: The Honorable Morris E. Lasker
United States District Judge

A 24

Letter dated May 20, 1977 forwarding Copy of
Mrs. Napoli's Gynecologist's Report

May 13, 1977

Ms. Barbara Jones
Assistant U.S. District Attorney
1 St. Andrews Plaza, 824
New York City, New York 10007

Dear Ms. Jones:

This letter concerns [REDACTED]. The patient has been under my care since March 4, 1977. She delivered a baby on March 15, 1977 and had a serious post-partum hemorrhage requiring a D&C and blood transfusions. Since that time she has been slightly anemic. At the time of her post-partum check-up six weeks later she appeared to be normal except for the anemia. However, in the past one week the bleeding has resumed and hormonal attempts at control are being instituted. I feel her situation is at best precarious with her previous history of bleeding after every spontaneous delivery or miscarriage and her recent experience requiring transfusion. I do not feel she is in a condition to travel and will not be in condition for at least a month. I will be evaluating her weekly. Should there be any change in her condition, I will attempt to notify you.

Sincerely,



FILED COPY OF JUDGE LASKER'S MEMORANDUM ORDER
DATED JUNE 6, 1977

UNITED STATES DISTRICT COURT

Memorandum

TO : All Counsel

DATE: June 6, 1977

FROM : JUDGE MORRIS E. LASKER

SUBJECT: United States v. Bufalino, et al
76 Cr. 982

The trial date in this case has been adjourned for a second time from May 31, 1977 to August 1, 1977, on the government's motion for an adjournment so that one of its two principal witnesses, Geraldine Napoli, will be able to testify.

This adjournment is warranted and the time period involved excludable from the 180-day period within which the defendants must be brought to trial under 18 U.S.C. §3161(h)(3)(A). As Ms. Jones' affidavit demonstrates, Geraldine Napoli is both an "essential witness" and "unavailable" within the meaning of the statute, since her whereabouts are known but her presence cannot be obtained by due diligence, in light of her medical condition.

Trial will commence at 10:00 A.M. on August 1, 1977, in courtroom 301.

NOTICE OF MOTION OF BUFALINO FOR DISCOVERY DATED DECEMBER 7, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----x
UNITED STATES OF AMERICA

NOTICE OF MOTION

-v-

Ind. No.
76-CR-982RUSSELL BUFALINO, MICHAEL
SPARBER, HERBERT JACOBS and
JOSEPH LAPADURA, a/k/a/ Lefty,Defendants.
-----x

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of WILFRED L. DAVIS, ESQ., sworn to on December 7th, 1976, the indictment herein and upon all prior proceedings heretofore had, a motion will be made on behalf of defendant RUSSELL BUFALINO before the HON. MORRIS E. LASKER, United States District Judge for the Southern District of New York, in the United States District Court House, at Foley Square, in the County of New York, City and State of New York, at such time and place as may be determined by the Court, seeking the following relief;

1. The United States Attorney disclose whether or not defendant Bufalino was subject to authorized or unauthorized electronic or other surveillance, burglaries, break-ins or mail openings and if so, the times and places those activities took place.

2.(a) The United States Attorney inform defendant Bufalino if any recordings, tapes or video tapes were made as the result of any

electronic or other surveillance, when and by whom they were made, when they were turned over to the Government and to whom.

(b). The United States Attorney provide defendant Bufalino with any transcripts, memorandums or evidence obtained as a result of any and all such electronic or other surveillance of which he was the subject or in which he was recorded, whether he was the subject of such surveillance or not and permit defendant to listen to any such tapes and view any video tapes.

3. The United States Attorney inform defendant Bufalino of the type and model of the electronic recording devices used and further that he be allowed to inspect them.

4. The United States Attorney inform defendant Bufalino whether Jack Napoli or any other Government witnesses were wired with electronic surveillance equipment, when and where recordings with this equipment were made, when they were given to the Government and to whom in the Government they were given.

5. The United States Attorney provide defendant Bufalino with any statement made by any defendant that he intends to use, or might or might not use, in evidence during the trial of this matter.

6.(a) The United States Attorney provide defendant Bufalino with copies of all notes and reports made in reference to this case by any Government agent. If any such notes or reports have been destroyed, defendant Bufalino should be informed of the date they were originally made, the date they were destroyed and their subject matter.

(b) The United States Attorney inform defendant Bufalino whether any notes and reports written by any Government agent in reference to this case were made before Herbert Jacobs had any dealings with Jack Napoli.

7. The United States Attorney be directed to provide defendant Bufalino with the names addresses of all witnesses the Government intends to call during the trial and permit defendant Bufalino to interview Jack Napoli and all other Government witnesses.

8. The United States Attorney provide defendant Bufalino with any statements made by any co-conspirators which either tend to incriminate him or exculpate him.

9. The United States Attorney provide defendant Bufalino with the results or reports of any physical or mental examinations and of scientific tests or experiments made in connection with this case, or copies thereof, within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known to the Government.

10. The United States Attorney inform the defendant Bufalino of any aliases by which Jack Napoli or any other witnesses were known.

11. The United States Attorney provide defendant Bufalino with a copy of Jack Napoli's and other witnesses' arrest records, commonly referred to as "rap sheets".

12. The United States Attorney provide defendant Bufalino with alleged co-conspirators' arrest records, commonly referred to as "rap sheets".

13. United States Attorney inform defendant Bufalino of all meetings Jack Napoli or any other witnesses had with Government agents in relation to this case and provide defendant with copies of all notes and reports prepared in connection with each such meeting.

14. The United States Attorney inform defendant Bufalino of all payments made directly or indirectly to Jack Napoli, any of his relatives or to any other witnesses, including, but not limited to wages, rent, allowances, transportation and medical payments; the date of all such payments, the names of those persons to whom such payments were made and by whom they were made.

15. The United States Attorney disclose to defendant Bufalino all promises and inducements made to Jack Napoli or any other witnesses in connection with their prior criminal acts, what those promises were and who made them.

16. The United States Attorney inform defendant Bufalino whether Jack Napoli or any other witness were paid informers and if any were, set forth the names of those persons who gave Jack Napoli or any other witness their instructions and the nature of the instructions.

17. The United States Attorney reveal Jack Napoli's connection with the United States Organized Crime Strike Force for the Southern District of New York and any other Government agency.

18. The United States Attorney inform defendant Bufalino of the date on which Jack Napoli first had any contact with the Government.

19. The United States Attorney provide defendant Bufalino with a listing of the times and places Jack Napoli or any other

witnesses were called as Government witnesses in any Federal criminal prosecution.

20. The United States Attorney inform defendant Bufalino if Jack Napoli worked with any other Government witness in cooperation with the Government and if so, with whom, when and where.

21. The United States Attorney provide defendant Bufalino with records, transcripts or recordings made of all meetings between Jack Napoli and Herbert Jacobs.

22. The United States Attorney inform defendant Bufalino whether any Government agent arranged for Jack Napoli to go to Herbert Jacobs to obtain jewelry.

23. The United States Attorney inform defendant Bufalino of all tangible objects and documents which may be used as evidence at the trial of this case.

24. The United States Attorney provide defendant Bufalino full and complete discovery and inspection as provided in Rule 16 of the Federal Rules of Criminal Procedure.

25. The United States Attorney provide defendant Bufalino with any exculpatory material of which it is aware, or of which by due diligence it should be aware, and further if any such exculpatory evidence should come to the United States Attorney's attention during the pendency of this litigation, he provide the same to defendant. Defendant intends by this request to seek all material commonly referred to as Brady material.

26. The United States Attorney be directed to set forth the following particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure:

a. The express threats alleged to have been made in counts one and two of the indictment.

b. State the substance of the implicit threats alleged to have been made in counts one and two of the indictment.

c. Describe the criminal means alleged in counts one and two of the indictment.

d. Set forth in what manner it is alleged the reputation of Jack Napoli was harmed as alleged in counts one and two of the indictment.

e. State whether it will be claimed that defendant Bufalino actually made any threats and if defendant Bufalino did not actually make the threats, then designate the person or persons who actually made the threats.

f. State the exact time and place defendant Bufalino entered the alleged conspiracy.

g. State whether the United States Attorney intends to offer in evidence at the trial hereof, acts comprising similar crimes, occurrences or backgrounds to establish identity, intent, knowledge or a common plan or scheme.

h. Set forth when, where and under what circumstances defendant Bufalino and his co-conspirators allegedly conspired to use physical violence and threats of violence against Jack Napoli.

i. Set forth when, where and in what manner defendant Bufalino and his co-conspirators allegedly threatened Jack Napoli.

j. Set forth the alleged nature of and the alleged manner in

In which the defendant Bufalino knowingly conspired, combined and agreed together with others to use extortionate means to collect or attempt to collect extensions of credit from Jack Napoli.

k. Set forth in what manner it is alleged extensions of credit were made by defendant Jacobs to Jack Napoli, as alleged in counts one and two of the indictment.

l. Set forth the telephone conversation alleged to have been had between Herbert Jacobs and Jack Napoli on or about March, 1976 in overt act one, the exact date and time of alleged telephone conversation and the locations of the telephones and the telephone numbers to which and from which the alleged call was made.

m. Set forth the conversation among Jack Napoli and defendants Michael Sparber, Herbert Jacobs and Joseph Lapadura at the Vesuvio Restaurant on or about March 31, 1976, alleged in overt act two, the exact time and date of the alleged meeting and what is alleged to have transpired.

n. Set forth the conversation that occurred among Jack Napoli and defendants Russell Bufalino, Michael Sparber and Joseph Lapadura, at Johnnie's Restaurant on or about April 5, 1976, alleged in overt act three, the exact time and date of the alleged meeting and what is alleged to have transpired.

o. Set forth the conversation between defendant Russell Bufalino and Jack Napoli at the Vesuvio Restaurant on or about April 12, 1976, alleged in overt act four, the exact time and place of the alleged meeting and what is to have transpired.

p. ~~Set forth the conversations between defendant Michael Sparber and Jack Napoli at the Vesuvio Restaurant on or about April 16, 1976 and April 20, 1976, alleged in overt acts five and six, the exact times and places of the alleged meetings and what is alleged to have transpired.~~

q. Set forth the exact times and places at and the dates on which defendant Russell Bufalino allegedly conspired to violate 18 U.S.C. §894.

r. Set forth the exact language, words, motions or gestures allegedly used by defendant Bufalino which indicated, or tended to indicate, he wilfully and knowingly combined, conspired, confederated and agreed to commit and did commit the crime charged in the indictment.

s. Set forth in what manner defendant Bufalino allegedly had any connection with, or did any act in the presence of, with, or in concert with any of the co-conspirators named in the indictment.

t. Set forth the names of any persons present when defendant Bufalino allegedly committed the crime charged in the indictment.

27. Permit defendant Bufalino to inspect the Grand Jury Minutes and/or dismiss the indictment pursuant to Rule 6 of the Federal Rules of Criminal Procedure.

28. The indictment be dismissed because the actions of the Government agents involved in this case violated defendant Bufalino's fifth amendment right to due process of law.

29. This Court afford defendant Bufalino the opportunity to challenge the legality of any information, tapes, tangible objects or other matter obtained as a result of the within

Notice of Motion of Bufalino for Discovery dated December 7, 1976

motion and to make further appropriate motions.

30. This Court grant defendant Bufalino such other and further relief as it may deem just and proper.

Dated: New York, New York
December 7, 1976

Yours, etc.

WILFRED L. DAVIS
Attorney for Defendant
Russell Bufalino
250 Broadway
New York, New York 10007
(212) 227-6640

TO: Robert B. Fiske, Jr., Esq.
UNITED STATES ATTORNEY
Southern District of New York
United States Court House Annex
1 St. Andrew Plaza
New York, New York 10007

AFFIDAVIT OF WILFRED L. DAVIS IN SUPPORT OF DISCOVERY MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

-v-

AFFIDAVIT

RUSSELL BUFALINO, MICHAEL
SPARBER, HERBERT JACOBS and
JOSEPH LAPADURA, a/k/a/ Lefty,

Ind. No.
76-CR-982

Defendants.

-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILFRED L. DAVIS, being duly sworn deposes and says:

1. I am the attorney for defendant Russell Bufalino, one of the named defendants in this matter.
2. Defendants herein have been charged in an indictment which alleges two counts, the first a conspiracy to violate 18 U.S.C. 894 and the second is the substantive count alleging violation of 18 U.S.C. 894 and 18 U.S.C. 892.
3. I am unable to adequately advise my client or prepare to defend him in this matter without being supplied with the information requested in the attached notice of motion, especially those requests pertaining to information regarding alleged acts of and statements made by defendant Bufalino.
4. The vindication or conviction of my client will depend

primarily upon the believability of one Jack Napoli. Therefore, it is essential I am aware of the background and the propensities of this witness in order to adequately protect my client and prepare a defense.

5. The items demanded in the bill of particulars are necessary to meet the issues to be presented at trial and to present my client's defense. Conspiracy charges usually involve acts and statements attributed to persons other than the moving party. In order to meet these charges it is necessary for the defendant to be informed of what these statements are and the identities of those persons to whom they are attributed. This will enable defendant to refute any such statements which may be introduced in evidence against him.

This reasoning also applies to any acts of those persons which it will be claimed were committed in furtherance of the conspiracy. If defendant is aware of the evidence against him, he can then have the opportunity to refute it. Since statements by a party to the alleged conspiracy, if made in furtherance of conspiracy, are admissible as evidence- they are not hearsay and evidence to refute such statements can only be obtained by defendant in advance of trial. If he knows the source of these statements, he can determine if he personally can contradict these statements if other witnesses can be called for this purpose or if additional, independent investigation is necessary.

6. The Government should be compelled to disclose whether it

will attempt to offer proof of similar acts or occurrences to show motive and intent since there are no allegations of any such acts or occurrences in the indictment. If the Government actually does introduce such evidence, the defendant will be unprepared to answer such allegations and will be surprised at trial.

7. The defendant is completely ignorant of what implications flow from statements attributed to this defendant or the other defendants concerning the explicit or implied use of the words "other criminal means". This is a vague expression and specifics as to the particular means allegedly used should be supplied to this defendant in order for him to refute this.

8. The indictment is based upon alleged extentions of credit by one of the defendants to Jack Napoli. However, nowhere are the defendants informed of the manner in which credit was extended. This is a vital element of the alleged crime, and the manner which credit was extended should be revealed.

9. The matters set forth in the indictment are vague and inform defendant of nothing. The overt acts refer very generally to meetings however do not reveal any specifics. Meetings in and of themselves are not crimes. The particulars demanded in connection with the overt acts should be supplied so defendant can investigate the fact and circumstances concerning these alleged meetings.

10. Disclosure sought under Rule 16 is particularly germane and necessary to an adequate defense as matters revealed will

enable your deponent to properly advise the defendant as to his defense and particularly whether he should testify in his own behalf or not. These statements may be offered in evidence by the Government against the defendant and may be admissible for impeachment purposes should the defendant testify. Such statements should also be disclosed so it can be determined whether it is appropriate to move for a severance under Rules 8 and 14 of the Federal Rules of Criminal Procedure.

11. That part of the motion dealing with disclosure and inspection in addition to the Rule 16 disclosures is essential as without it defendant will be unable to adequately prepare for trial or to cross examine effectively at the trial. The Government has agreed to permit the defense to listen to certain tape recordings made however there may be other tangible items, recordings, tapes and video tapes knowledge of which the defense should have to adequately investigate the case and meet the charges and to further offer a proper defense.

12. The disclosure of the identities of the Government's witnesses and the right to interview them will enable the defense to adequately investigate the case and effectively cross examine on trial. This request is reasonable and well within the Court's discretion to grant.

13. Disclosure of Statements made by persons who are not to be called as witnesses is also necessary. Such statements may furnish evidence to the defense which will enable it to conduct

A 39

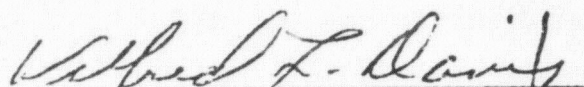
Affidavit of Wilfred L. Davis in Support of Discovery Motion

further investigation to prove the innocence of the defendant and their value can only be determined by the defense.

14. The particulars set forth in the attached motion are material and necessary for the preparation of the defense herein.

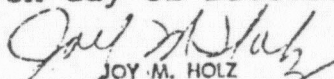
15. No prior application has been made for the relief sought to this or any other Court.

WHEREFORE, it is respectfully requested this Court grant the relief described in the annexed motion and such other and further relief as this Court may deem just and proper.


WILFRED L. DAVIS

Sworn to before me this

7th day of December, 1976


JOY M. HOLZ
Notary Public, State of New York
No. 31-6951523
Qualified in New York County
Commission Expires March 30, 1978

GOVERNMENT'S RESPONSE TO BUFALINO MOTION FOR DISCOVERY
DATED DECEMBER 28, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA,

-v-

RUSSELL BUFALINO,
MICHAEL SPARBER,
HERBERT JACOBS and
JOSEPH LAPADURA,

Defendants.

----- x

AFFIDAVIT

76 Cr. 982

(MEL)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

BARBARA S. AMBLER, being duly sworn deposes and says:

1. I am a Special Attorney, United States Department of Justice, assigned to the above-captioned case and, as such, am familiar with the facts therein.

2. This affidavit and accompanying memorandum of law, are filed in response to various pre-trial motions made by the defendants. The responses will be numbered to correspond with the numbers used by each defendant in his moving papers.

MOTIONS MADE ON BEHALF OF
THE DEFENDANT RUSSELL BUFALINO

(1-4.) The voice of defendant Russell Bufalino was tape recorded on two occasions: (a) April 12, 1976 between 12:15 p.m. and 1:00 p.m., inside the Vesuvio Restaurant, 163 West 42th Street, New York City; and (b) April 20, 1976 over the telephone

inside the Consulate Hotel, New York City, exact time of day unknown. Both of these recordings were made by Jack Napoli.

On April 12, 1976 Napoli wore a Kel electronic transmitter and a Nagra tape recorder on his body. On April 20, 1976 a Sony cassette recorder was used to record the telephone conversation. These transmitting and recording devices will be made available to the defendants for inspection at the office of the affiant upon ten days notice.

The affiant provided the defendant Bufalino with the transcripts of these two recorded conversations on November 18, 1976.

The original tape recordings are in the custody of the F.B.I. at 201 East 69th Street, New York City and are available for inspection upon ten days notice. Duplicates of these tape recordings are available now to be listened to at the office of the affiant upon appointment.

The tape of the April 12, 1976 conversation was given to Special Agents Edward F. Cunningham and Stephen F. Edwards at approximately 5:45 p.m. on April 12, 1976 by an unidentified female. The tape of April 20, 1976 was given to Special Agent Stephen Edwards by Jack Napoli on April 20, 1976.

To my knowledge Russell Bufalino has not been nor is he currently the subject of any unauthorized electronic or other surveillance, burglaries, break-ins or mail openings. Further, there are no video tapes of Mr. Bufalino in the possession of the Government.

The affiant has agreed to request that a check of federal agencies be made to determine whether Bufalino or any of the other defendants were or are the subject of electronic surveillance by any government agency. These checks routinely take a month to six weeks. The affiant, however, has no knowledge of any such surveillances.

5. The Government will provide each defendant with the transcripts of all tape recordings containing the statements of any one or more defendants. The Government has already provided each defendant with his own statements as required by Rule 15(a)(1)(A). Beyond the tape recordings the Government declines to provide the defendant Bufalino with the other statements of his co-defendants (See Memo of Law).

6. (a-b) The Government declines to provide defendant Bufalino with these documents or this information. (See Memo of Law).

7. The Government, as of this date, intends to call as witnesses: Jack Napoli and Geraldine Napoli. It is also possible that the Government will call Special Agent Steven Edwards as well as other Special Agents of the F.B.I., in connection with the tape recordings.

The Government declines to provide the defendants with the addresses of any of the Government's witnesses. Special Agents of the Federal Bureau of Investigation have informed me that the lives of Jack and Geraldine Napoli, whose identities are known to the defendants -- are in danger, according to reliable informant

information, as a result of their anticipated testimony in this case. Accordingly, they have been relocated by the United States Marshal's Office.

Should the Government decide to call additional witnesses, their names and identities will be provided to the defendants, or, if it is deemed by the Government that such disclosure will put them in jeopardy, the court will be advised of their identities and the basis for the Government's fears in camera, and disclosure will be made only at the court's discretion.

The affiant will communicate with the Napolis and with Special Agent Edwards to determine if any of them desire to be interviewed by counsel for any of the defendants. (See Memo of Law).

8. The Government declines to provide the defendant Bufalino with incriminatory statements made by co-conspirators. (See Memo of Law). No such exculpatory statements are known to the Government. If any become known, of course, they would be disclosed pursuant to our obligation under Brady v. Maryland.

9. No physical or mental examinations or scientific examinations or scientific tests or experiments made in connection with this case are known to the Government.

10. No aliases of Jack Napoli or any other witness are known to the Government. If any are discovered the defendants will be advised.

11. The arrest record, if any, of the Government's witnesses will be provided prior to trial.

12. Each defendant has been furnished with his own arrest

record. The Government declines to provide each defendant with copies of all co-conspirators' arrest records, and the defendant advances no authority for this request.

13. The Government declines to furnish this information. See previous response to Item #6.

14-19. The Government consents to provide this information and will do so on or before February 1, 1977. Except that with respect to #16 the Government declines to set forth "the nature of the instructions" if any.

20. The Government declines to reveal this information, as it is not discoverable and is simply a request for details of the Government's proof.

21. Already consented to. See previous response to Item #5.

22. While not conceding that the defendant is entitled to this type of information, the affiant expects that the Government's proof will show that Jack Napoli did not go to Herbert Jacobs to obtain jewelry at the behest of any Government agent.

23. Consented to.

24. This request is consented to and has already been substantially complied with.

25. The Government is aware of its obligations under Brady v. Maryland.

BUFALINO REQUESTS FOR PARTICULARS

The Government does not consent to provide the defendant Bufalino with the following particulars:

a through f; h through k; 2 through t

(See Memo of law: Bill of Particulars)

The Government does consent to provide the information requested in items: g, and l through p (to the extent known to the Government);

Except that the Government does not consent to set forth the conversations in items l, m and n, and it should be noted that the defendant already has a transcript of the conversation of April 12, 1976 (o) and will shortly be supplied with transcripts of the conversations which took place on April 16 and April 20. (p.)

27. The Government opposes disclosure of the grand jury minutes to defendant Bufalino. (See Memo of Law.)

MOTIONS MADE ON BEHALF OF
THE DEFENDANT MICHAEL SPARBER

1. The Government opposes striking the phrase "a/k/a Lefty" from the indictment. (See Memo of Law: Sparber Motions)

2. The Government does not consent to provide the defendant Sparber with the following particulars:

a; d through g; i, and k through p

(See Memo of Law: Bill of Particulars)

The Government does consent to provide the information requested in items: b, c, h, j, and q;

Except the Government does not consent to: 1) specify the basis for the Government's contention that any individual is an unindicted co-conspirator in (b); nor to 2) specify "each action" of Jack Napoli evidencing "bad character or reputation" or "immoral conduct" in (j). The Government will disclose any and all convictions, and any pending charges against Napoli as well as any prior material misconduct on his part known to the Government. With respect to (q) the Government will disclose any prior informant relationship of Napoli with the Government or with "police officers" to the extent it is known to the Government, and any monies he may have received. The Government declines to specify "each act" Napoli may have performed as a paid or unpaid informant.

With respect to (c) there are no informants involved here who played a material part.

3. Consented to. *(Rule 16 disclosure)*

4. Consented to except for item (b)(iii), and See re- response #9 to Bufalino Motions re. item (c). As to Item (b)(iii), Proving Federal Crimes is an internal government document prepared by the Criminal Division of the Office of the United States Attorney for the Southern District of New York and restricted to use by Department of Justice personnel. The defendant Sparber has advanced no authority in support of his position that the Government is somehow obligated to make this document available to him and the Government fails to see how this request is support-
able under any theory.

5. The Government would have no objection to an extension of defendant Sparber's bail limits upon a representation that it was necessary in the exercise of his employment or his search for employment.

6. Consented to with regard to electronic surveillance. See this affidavit, p.2, para. 4 and 5. Although paragraph 4 refers specifically to Russell Bufalino it applies to defendant Sparber as well.

Affiant is also aware that physical surveillances were made and that possibly photographs were taken in connection with this case. If such photographs exist they will be made available to all defendants. The Government declines to provide the defendants with the specific times, places and circumstances of these physical surveillances.

7. The defendant Sparber is already in possession of the transcripts of tape recordings of conversations which he participated in on:

April 12, 1976; April 13, 1976;
April 15, 1976; April 16, 1976;
April 19, 1976 and April 20, 1976.

These are the only tape recordings of Mr. Sparber in the possession of the Government. The Government consents to provide the defendant Sparber with the chain of custody as to these recordings within seven days by letter.

8. Consented to. See this affidavit p.2, para. 2.

9. Consented to in part; declined in part. See this affidavit, p. 3, #7 and Memo of Law, p.2, #7.

MOTIONS MADE ON BEHALF OF
HERBERT JACOBS

The Government consents to provide the defendant Jacobs with his requests numbered: 1, 7, 9, 10, 11, 12 and 16. With respect to Item 11, the defendant Jacobs is already in possession of this material. As for Item 16, again, the Government is aware of its obligation under Brady v. Maryland.

The Government does not consent to the following requests: 2 through 6, 8, and 13 through 15. With respect to items 2 through 6 and 8. See Memo of Law: Bill of Particulars. With respect to Item 13, see this affidavit p.2, #5. With respect to Items 14 and 15 see this affidavit p.3, #6 and #7.

MOTIONS MADE ON BEHALF OF
JOSEPH LAPADURA

1. The Government opposes striking the phrase "a/k/a Lefty". See Memo of Law (Sparber Motions #1).

2.-4. Consented to.

5. Denied, except to the extent consented to in prior responses.

7. The Government opposes this. See Memo of Law (Bufalino Motions #27).

8. See this affidavit, p. 3, para. 7.

Government's Response to Bufalino Motion for Discovery
dated December 28, 1976

9. Consented to.

10. The Government will provide the defendant Lapadura with the arrest record, if any, of any witness testifying at trial. The Government does not recognize defendant's right to the arrest records, if any, of witnesses before the grand jury or at evidentiary hearings.

11. The defendant Lapadura has already received his own statements. The Government declines to provide him with all statements of the other defendants. See Memo of Law: Bufalino Motions #5.

12. The Government asserts that the defendant Lapadura is properly joined in this indictment pursuant to Rule 8 of the Federal Rules of Criminal Procedure. Further, the Government cannot respond to defendant's motion for severance under Rule 14 as no grounds have been advanced to support this motion.

13.-14. Again, the Government recognizes its obligation under Brady v. Maryland.

Barbara S. Ambler

BARBARA S. AMBLER
Special Attorney
United States Department of Justice

Sworn to before me this

28th day of December, 1976

Steven K. Frankel
STEVEN K. FRANKEL
Notary Public, State of New York
No. 24-462/105
Qualified in Kings County
Commission Expires March 30, 1977

FILED DEFENDANT'S NOTICE OF MOTION FOR AN ORDER TO
SUPPRESS EVIDENCE, DISMISS INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

NOTICE OF MOTION

-v-

76-CR-982
(MEL)

RUSSELL BUFALINO, MICHAEL
SPARBER, HERBERT JACOBS and
JOSEPH LAPADURA, a/k/a Lefty,

Defendants.

-----x

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of
WILFRED L. DAVIS, sworn to on March 31, 1977, the indictment
herein and upon all prior proceedings heretofore had, a motion
will be made on behalf of defendant RUSSELL BUFALINO pursuant to
Rule 12(b), F.R. Crim. P. before the HON. MORRIS E. LASKER,
United States District Judge for the Southern District of New York,
in the United States District Court House, at Foley Square, in
the City, County and State of New York, at such time and place
as may be determined by the Court, seeking the following:

1. The Court suppress all evidence (both recordings and
testimony) with respect to conversations said to have taken
place between the Government's informant, Jack Napoli, and
one or more of the defendants on April 12, 16 and 20, 1976
on the ground that the recordings, made by a Nagra body
recorder, are inaudible, unintelligible and unreliable and other

recordings of the same conversations, made by means of a Kel transmitter, have been deliberately destroyed by agents of the Federal Bureau of Investigation;

2. The indictment be dismissed as it fails to charge the defendant with any offense against the laws of the United States and the acts allegedly committed by defendants are not crimes within the purview of Title 18 U.S.C. §892 and §894 because the jewels referred to in the indictment were not obtained on credit but were fraudulently obtained by informant Napoli;

3. The United States Attorney disclose the complete circumstances surrounding informant Napoli's misconduct in fraudulently obtaining two rings from a jewelry store with bad checks, the name of the store and where pawned by informant Napoli while in the Government's witness relocation program and during the pendency of this case;

4. The United States Attorney disclose the circumstances surrounding informant Napoli's misconduct in obtaining a bank loan under false pretenses, having represented himself to be a federal officer, and the name of the bank from which the loan was fraudulently obtained by informant Napoli while in the Government's witness relocation program and during the pendency of this case;

5. The United States Attorney disclose any further misconduct by informant Napoli not previously disclosed;

6. The United States Attorney disclose the date of informant Napoli's marriage to Geraldine "Napoli", the date of his divorce from his former spouse and her name;

*Filed Defendant's Notice of Motion for an Order to
Suppress Evidence, Dismiss Indictment*

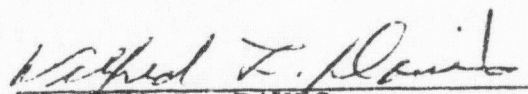
7. The United States Attorney disclose all payments made by the Government to and on behalf of informant Napoli and any payments made by it to or on behalf of any relative of informant Napoli;

8. An evidentiary hearing be scheduled by the Court with respect to the present motion and the Government be directed to produce at the hearing informant Napoli, F.B.I. Agent Stephen Edwards and any other F.B.I. Agents or persons who listened to the April 12, 16 and 20, 1976 Kel transmissions, or any recordings thereof, and who were responsible for their destruction.

9. This Court grant defendant Bufalino such other and further relief as it may deem just and proper.

Dated: March 31, 1977

Yours, etc.



WILFRED L. DAVIS
250 Broadway
New York, New York 10007
Telephone No. (212) 227-6640

Attorney for Defendant
Russell Bufalino

TO: Robert B. Fiske, Jr., Esq.
UNITED STATES ATTORNEY
Southern District of New York
United States Court House Annex
1 St. Andrews Plaza
New York, New York 10007

A 53
AFFIDAVIT OF WILFRED L. DAVIS IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

AFFIDAVIT

-v-

RUSSELL BUFALINO, MICHAEL
SPARBER, HERBERT JACOBS and
JOSEPH LAPADURA, a/k/a Lefty,

76-CR-982
(MEL)

Defendants.

-----X
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILFRED L. DAVIS, being duly sworn deposes and says:

1. I am the attorney for defendant Russell Bufalino, one of the named defendants in this matter.
2. I make this affidavit in support of the annexed motion.
3. Defendant Bufalino moved for an order directing the Government to inform him if any recordings, tapes or transcripts were made as the result of any electronic or any other surveillance. The Government informed defendant that conversations between informant Napoli and one or more of the defendants were recorded specifically, that conversations of April 12, 16 and 20, 1976 were recorded by means of both a Kel transmitter and a Nagra body recorder.
4. Counsel listened to portions of the original Nagra body recordings at F.B.I. Headquarters and duplicates of those recordings, said to be filtered by the F.B.I. in a manner calculated

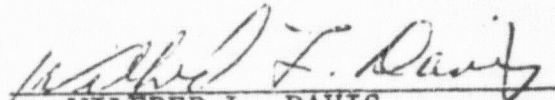
to improve their audibility, supplied by the Government to counsel and found it impossible to hear or understand most portions of the Nagra body recordings of April 12, 16 and 20, 1976. The problem of inaudibility of the Nagra body recordings was discussed with the Court and Government counsel at a pretrial conference on January 31, 1977 at which time it was requested defense counsel be permitted to listen to the recordings of the April 12, 16 and 20, 1976 conversations made by means of the Kel transmitter. The Government informed the Court and defense counsel for the first time that it did not have in its possession the recordings of the Kel transmitter of April 12, 16 and 20, 1976 because these recordings had been destroyed by the Federal Bureau of Investigation.

5. Count 1 of the indictment charges that "from in or about February 1976" the defendants conspired to threaten Napoli in order to collect extentions of credit said to have been made by defendant Jacobs in connection with the "sale" of certain jewels. The Government has conceded that the jewels were obtained by fraud by informant Napoli from defendant Jacobs. Government's counsel in a letter to defense counsel dated February 14, 1977 stated "Napoli gave Jacobs a check for \$6,000 for the diamonds***. This check was written on the account of Napoli Brothers Pork Store which was was no longer in business, and [the check] bounced".

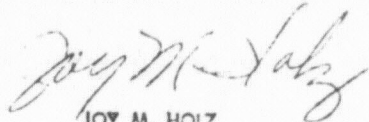
WHEREFORE, it is respectfully requested this Court grant

Affidavit of Wilfred L. Davis

the relief described in the motion and such other and further relief as this Court may deem just and proper.


WILFRED L. DAVIS

Sworn to before me this
31st day of March, 1977



JOY M. HOLZ
Notary Public, State of New York
No. 31-6931525
Qualified in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF GOVERNMENT IN RESPONSE DATED APRIL 12, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - -X

UNITED STATES OF AMERICA :

-v- :

AFFIDAVIT

RUSSELL BUFALINO, et al., :

76 Cr. 982

(MEL)

Defendants. :

- - - - -X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

BARBARA S. JONES, being duly sworn, deposes and
says:

1. I am an Assistant United States Attorney in
the office of Robert B. Fiske, Jr., the United States
Attorney for the Southern District of New York. As such,
I am in charge of the prosecution of the above captioned
matter.

2. I make this affidavit and the attached
Memorandum of Law in opposition to the motions of the
defendants Russell Bufalino and Michael Sparber to suppress
tape recordings and other evidence, to dismiss the indict-
ment, and to request additional discovery.

3. Defendant Sparber's first motion is for
suppression of both the diamonds obtained by Napoli from

the defendant Jacobs and the consent tape recordings of April 12th, 16th and 20th also obtained by Napoli. This motion is frivolous and unsupported by either the facts or the law.

Sparber's basis for this request is an allegation of "governmental misconduct," based on disclosure made by the government as pre-trial discovery. The facts cited by Sparber to support this allegation are that Napoli received \$400.00 from the F.B.I. during the period January through March, 1976 and that he obtained the first of several diamonds from the defendant Jacobs with a fraudulent check.*

Neither of these facts, however, establish any governmental misconduct. Moreover, Sparber ignores other facts disclosed by the government which belie any such theory. These are: (1) that Jack Napoli never told the F.B.I. during the period January through March, 1976 (the period during which he was paid the \$400.00) that during February, 1976 he had obtained diamonds from Jacobs, and (2) that no instructions were given Napoli at any time by any police

* Napoli's obtaining the first diamond with a fraudulent check would seem to have no relevance to the issue of governmental misconduct. To the extent that it is relevant to the defendant, Bufalino's "extension of credit" argument will be dealt with there.

officer or F.B.I. agent as to what to say or how to conduct himself with Herbert Jacobs, Russell Bufalino or any other defendant.** In short, the facts as they are known to the government and have been disclosed to the defendants establish that there was no governmental misconduct.

Further, each of the cases cited by Sparber on this point relates to the suppression of either evidence or leads obtained as the result of an unlawful search and seizure by government agents. These cases are totally inapposite to the situation here where the government has obtained recordings through the consent of a party to the conversations and has obtained other tangible evidence (the diamonds) during the course of a grand jury investigation, by subpoena.

4. Sparber's second motion is for suppression of the Nagra body recordings on the ground that they are inaudible. I have listened to these recordings and find them to be almost completely audible. In fact, extensive transcripts have been prepared from these tapes and there is no

** The reports of F.B.I. informant contacts with Jack Napoli during the period prior to his April 8th contact with the New York Office are now in my possession and have been appended to the Court's copy of this affidavit for Judge Lasker's in camera inspection. They are dated January 16, 1976, January 27, 1976 and March 29, 1976. The prior statement in my letter dated February 14, 1977 that Napoli gave information between January 22 and March 5, 1976 was incorrect.

"substantial portion" on any of these tapes which is not audible. The government will demonstrate this at the audibility hearing now tentatively scheduled for April 21, 1977. Further, even though the Court will find some insignificant portions of these tape recordings inaudible, these do not render them inadmissible. United States v. Knohl, 379 F.2d 427 (2d Cir.), cert. denied 389 U.S. 973 (1967). *

5. Sparber's third motion is to suppress the Nagra recordings because the F.B.I. has destroyed the Kel transmitted recordings of these same conversations. A major part of his argument is based on the assertion that the Nagra recordings are largely unintelligible and the suggestion that the Kel transmissions were "the only possibly audible recordings" and might have contained exculpatory material. The government's view is that the Nagra tapes are almost entirely audible. Further, in the Affidavit of Special Agent Edwards, attached to the government's Memorandum of Law, he states that large portions of the Kel transmissions were totally inaudible and that it

* The Frazier case cited by both defendants Sparber and Bufalino merely stands for the proposition that it is within the discretion of the trial judge to refuse to allow the admission of a tape recording, of which only 25% is intelligible. See United States v. Frazier, 479 F.2d 983 985 (2d Cir. 1973).

^{among others}
was for this reason that they were destroyed. (See Government's Memorandum of Law, Pt. I).

6. The only additional motion made by defendant Bufalino (other than additional requests for discovery which will be discussed below) is his motion for dismissal of the indictment on the ground that the facts do not establish an "extortionate extension of credit." On this motion see Point II of the attached Memorandum of Law.

7. The government declines to provide the defendant Bufalino with the specific information asked for in his requests numbered 3 and 4. These details are unnecessary for effective impeachment of Napoli and could result in the compromise of his new identity and whereabouts.

8. The government will disclose the date of Napoli's marriage to his present wife and the name of his former wife. The government does not possess any information with respect to the date of his divorce from his former spouse. (Bufalino Request #6).

9. The government will disclose any additional payments by the government to Napoli which it has not already disclosed. (See Government's letter dated February 14, 1977.)

10. The government opposes defendant Bufalino's request for a hearing with respect to the destruction of the tapes as unnecessary in view of the facts set forth in the affidavit of Special Agent Edwards.

WHEREFORE, the government respectfully requests that the motions of defendants Sparber and Bufalino be denied in all respects.

BARBARA S. JONES
Assistant United States Attorney

Sworn to before me this

12th day of April, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

- v -

76 Cr. 982 (MEL)

RUSSELL BUFALINO, HERBERT JACOBS,
MICHAEL SPARBER and JOSEPH
LAPADURA,

MEMORANDUM

Defendants.

-----X

APPEARANCES:

ROBERT B. FISKE, JR., ESQ.
United States Attorney
One St. Andrews Plaza
New York, New York 10007
Of Counsel: BARBARA S. JONES, ESQ.
Assistant United States Attorney

WILFRED L. DAVIS, ESQ.
250 Broadway
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HAROLD O.N. FRANKEL, ESQ.
253 Broadway
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Attorney for Herbert Jacobs

WILLIAM J. GILBRETH, ESQ.
c/o FISH & NEAVE, ESQS.
277 Park Avenue
New York, New York 10017
Attorney for Michael Sparber

JOHN IANNUZZI, ESQ.
233 Broadway
New York, New York 10007
Attorney for Joseph Lapadura

LASKER, D.J.

Russell Bufalino, Michael Sparber, Herbert Jacobs and Joseph Lapadura are charged in a two count indictment with using extortionate means to collect extensions of credit from Jack Napoli and conspiracy to do the same in violation of 18 U.S.C. §894. They move to suppress all evidence, including Nagra tape recordings, transcripts thereof and testimony, with respect to three conversations between Napoli and one or more of the defendants on the ground that the F.B.I. agent in charge of the investigation intentionally destroyed a duplicate set of recordings of those same conversations made by the use of a Kel transmitting device. In addition, Sparber and Bufalino move for divers relief based on their suspicion of other improper government action in the conduct of the investigation.

A. The Destruction of the Kel Tapes

An evidentiary hearing was held in two parts on May 5 and May 9, 1977. The government presented the testimony of Stephen F. Edwards, the agent who destroyed the Kel tapes, and Paul Ginsberg, an expert in audio engineering. The defendants presented no witnesses. The facts, which are not disputed, are as follows.

1. Facts

On three occasions during the course of the investigation which resulted in the pending indictment, Edwards

equipped Napoli, a government informant, with recording devices and taped conversations between Napoli and various individuals, including the defendants Bufalino, Sparber and Jacobs. These conversations took place, for the most part, in and near the Vesuvio Restaurant on West 48th Street in Manhattan. They form a vital part of the government's case.

On each occasion Napoli was outfitted with a Nagra tape recorder and a Kel transmitter, and the two units operated simultaneously. The Nagra device is a self-contained tape recording unit. The Kel transmitter, as its name implies, is only a transmitting device, through which Napoli's conversations were monitored by F.B.I. agents at several nearby locations. The agents recorded the Kel transmissions as they were broadcast over radio receivers.

All three conversations were recorded on the Nagra machine. The F.B.I. agents made a single recording of the Kel transmission of the first conversation, which took place on April 12, 1976, on a Sony cassette located in a truck parked several hundred feet from the Vesuvio Restaurant. They made two recordings of the Kel transmission of the second and third conversations, on April 16th and 20th, one on the Sony cassette, which was in a surveillance car, and one on an SK 8 tape recorder located in the suitcase of a surveillance agent who was inside the restaurant.

(Tr. 80) He believed it to be standard F.B.I. procedure to destroy such tapes, and after consulting with brother agents who confirmed that this was the thing to do, he disposed of them. This was, as best Edwards could recall, about a week or so after they were made.

Although Edwards was in constant contact with the United States Attorney's Office, and in fact forwarded the Nagra tapes to the Assistant handling the investigation within a day or two of their making (Tr. 141), he never informed the office that the Kel transmissions had been taped or that the tapes had been destroyed. These facts first came to light when Edwards was asked by defense counsel whether the transmissions had been taped at a pre-trial conference on November 18, 1976.

The government's expert, Ginsberg, testified that Nagra recording equipment is in all respects superior to the Kel device and that, assuming proper functioning, Nagra recordings are accordingly consistently more audible and reliable than those made on Kel machinery. It is, of course, not disputed, however, that there were at least some audible passages on the ^{Kel} recordings. Further, it cannot be said with certainty that there were no portions of the conversations audibly recorded through the use of the Kel machine which were inaudible on the Nagra tapes, although Edwards did testify that he recalls no such

Agent Edwards, who personally monitored all three conversations, listened to all of the tapes. (Tr. 75) He played each of the Nagra tapes as well as the single Kel recording of the 12th and the two Kel recordings of the 20th on the day they were made. He played the two Kel recordings of the conversation of the 16th several days after that date. With regard to each of the three conversations, Edwards listened at least once to all of the recordings at one sitting, one after the other.^{1/} He testified that for each conversation the Nagra recording was "far superior" to any of the Kels. (Tr. 79-80) The latter, he said, were "largely inaudible." (Tr. 79) This result conformed to his experience in previous situations where duplicate recordings had been made in that the Nagra recordings were consistently more audible than recordings of Kel transmissions.

Edwards testified that his principal purpose in using the Kel transmitter was to monitor the conversations and be able to step in to protect Napoli in the event of danger. He stated that the taping of the Kel transmissions was strictly a secondary, back-up procedure "to have something salvageable" in the event the Nagra device malfunctioned. (Tr. 104) Having compared the recordings and found the Nagras to be superior, Edwards concluded that there was "absolutely no use for [the Kel recordings]."

instances and believes none to have existed. See note 1, supra.

2. Discussion

The defendants argue that Edwards' deliberate destruction of tape recordings which are clearly discoverable under Fed. R. Cr. P. 16 and fall within the Jencks Act, 18 U.S.C. §3500, requires suppression of all remaining evidence regarding the three conversations. The government responds that such relief is unwarranted where, as here, the destroyed tapes were, at best, grossly inferior duplications of the Nagra material, all of which has been carefully preserved and made fully available to the defense, and the destruction, though intentional, was in good faith. In these circumstances, the government argues, the defense should be required to make a showing of prejudice, such as the real possibility that exculpatory material may have been lost, before the sanction of exclusion should be considered.

In determining whether to impose sanctions on the government for the loss or destruction of evidentiary material a court is required to weigh "the extent of the Government's culpability for the loss or destruction and the amount of prejudice to the defense which resulted."

United States v. Miranda, 526 F.2d 1319, 1325-26 (2d Cir. cert. denied, 45 U.S.L.W. 3249, Oct. 4, 1976. 1975), / Here, government culpability is high. It is un-

disputed that Edwards deliberately destroyed the Kel tapes. The defendants' argument that this, alone, requires suppression, however, is an overstatement. Indeed, in United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972), cited with approval in Miranda, supra, the Second Circuit affirmed a conviction which was challenged, inter alia, on the grounds that the district court failed to suppress evidence regarding a conversation between the defendant and a government informant because the single recording of that conversation had been intentionally destroyed by police. Significantly, the reason given by the police for their action in Augello was that the tape recording, which appears to have been made by the use of a Kel transmitter, was unintelligible. 451 F.2d at 1169-70.

On the other side of the coin, indication of prejudice to the defendants from Edwards' actions is singularly weak. The defendants attempt to discredit the reliability of the Nagra recording by suggesting that Napoli might have turned the machine off at certain points in the conversations or tampered with the tapes in the period they were in his custody following the conversations but prior to being picked up by the F.B.I. agents. (Tr. 89-100) In contrast, they argue, the Kel recordings would necessarily have been reliably complete. This attack on the

Nagra tapes is purely speculative, and it is undermined by the fact that there was no evidence that Napoli had tampered with the Nagra machine.^{2/} In addition, Edwards, who monitored all three conversations and listened to all of the tapes, testified that so far as he is aware, the Nagra machine was neither turned off nor tampered with and the resulting recording is a continuous and complete reflection of the conversation. (Tr. 153-54) Moreover, we credit Edwards' testimony that the Kel recordings were seriously inferior to those made on the Nagra machine, "very distorted and static" (Tr. 80) and, indeed, "largely inaudible." (Tr. 79)^{3/} In contrast, although there undeniably are portions which cannot be discerned, the Nagra recordings, when filtered, are of a relatively high quality.^{4/}

In United States v. Miranda, supra, the court approved the district court's refusal to suppress testimony by an undercover informant and police officers about the critical conversation between the informant and the defendant, where the conversation had been monitored and recorded by the use of a Kel device, but the tape, the only recording made, had been lost due to negligence of the police. The court observed that in view of all the other evidence it was "more likely" that the tape would have corroborated the government's version of the conversation than the defendant's and that the defense had been

permitted to bring out all the facts surrounding the loss of the tape and to attempt to make the most out of it before the jury. 526 F.2d at 1327-29. In these circumstances, the court concluded that suppression "would be an unduly heavy sanction to impose upon the Government for the loss of a piece of evidence concerning a subject on which there was other primary evidence available and adduced." Id. at 1329.

The decision applies here. As in Miranda, there is no reason to believe that any material on the Kel tapes which might have clarified some of the inaudible portions of the Nagra tapes, assuming such material existed, would have been favorable to the defense, in view of the nature and content of the Nagra recordings. Thus, this is emphatically not a case, such as United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976), on which the defendants rely, where the record indicates that the destroyed evidence is likely to have contained important evidentiary material not otherwise preserved which might prove helpful to the defendant. Nor, although the destruction was wilful, is there any hint of bad faith in this record. Compare, United States v. Lonardo, 350 F.2d 523 (6th Cir. 1965). Indeed, the record indicates that Edwards believed he was acting in accordance with F.B.I. procedures. While this does not exonerate his actions, United States v. Carrasco,

supra, 537 F.2d at 376; Lee v. United States, 368 F.2d 834, 837 (D.C. Cir. 1966), destruction of tapes due to unintelligibility is in fact a practice which has been countenanced by the courts. United States v. Augello, supra; United States v. Bryant, 448 F.2d 1182, 1184 (D.C. Cir. 1971) (intentional non-preservation of tapes). Under Miranda, suppression here might be inappropriate even if no other recordings were preserved. It is especially so given the existence of the complete set of Nagra tapes of generally high quality.^{5/}

This disposition of the motion should not be interpreted as approval of the procedures employed here by Agent Edwards. Determinations as to the usefulness of tape recorded evidence containing Rule 16, "3500" and, possibly, Brady material, are for the court and counsel, not the F.B.I. Whatever burden the preservation of extra reels or cassettes of tape may impose on the facilities of law enforcement agencies is vastly outweighed by both the defendant's interest in the preservation and availability of all evidence which might arguably prove useful to him and the public interest in minimizing the threat to an otherwise sound prosecution posed by such careless practices. The Second Circuit has recently cautioned that the F.B.I. would be "well advised" to retain handwritten notes of interviews with witnesses even after final typewritten

reports have been prepared. United States v. Anzalone, Dkt. Nos. 76-1458 and 76-1461, May 6, 1977, slip op. at 3399. This statement was made despite the fact that the court has consistently held such notes not to be Jencks Act material. A fortiori, a similar warning is in order with respect to tapes such as those here at issue, which are indisputably within the ambit both of Rule 16 and the Jencks Act.

B. Other Alleged "Governmental Misconduct"

Both Bufalino and Sparber move for additional relief based on another aspect of the case. The government has disclosed that the extensions of credit on which the indictment is based involve a series of transactions between Napoli and the defendant Jacobs sometime in February and/or March, 1977, in which Napoli obtained diamonds and certain other jewelry from Jacobs in return for promises of repayment and, in the case of the first transaction, for a check. Napoli's check, however, was written on the account of a defunct company, and it bounced. These and other circumstances tend to indicate that Napoli was attempting to defraud Jacobs. The government has further disclosed that Napoli first reported his difficulties with the defendants over his debt to Jacobs to state authorities in March, 1977, and to the F.B.I. in early April, at a time after the debt arose when the defendants were allegedly pressuring him for repayment. However, Napoli had previously

given information regarding other activities to law enforcement officials. As part of this prior cooperation in the period January to March, 1977, Napoli gave information to the F.B.I. in Newark, New Jersey, which, although unrelated to the events here in issue, did contain minor references to the defendants Jacobs and Bufalino. He was paid \$400. for this earlier information.

Based on these facts Sparber hypothesizes that the F.B.I. was behind Napoli's transaction with Jacobs from the inception. He moves 1) to suppress all evidence regarding these transactions on grounds of governmental misconduct and 2) for pretrial disclosure of material in the F.B.I. reports regarding Napoli's prior cooperation which might reveal, generally, that their involvement together at the outset of the transaction was greater than the government has represented and, specifically, the basis for the earlier \$400. payment.

It is unclear whether Sparber's reference to misconduct is an allusion to possible entrapment or simply the fact that Napoli may have initially obtained the jewelry from Jacobs in the course of a fraudulent scheme. In either case there is no basis whatsoever for suppression. Though there is little to suggest entrapment based on the government's disclosures to date, Sparber will of course be free to attempt to establish this defense at

trial. It is not grounds for pretrial relief in the form of suppression. Nor is there reason to believe the government was behind the initial "fraud" on Jacobs. Even if it was, however, Sparber cites no authority for his claim that this would be misconduct in any way sufficient to warrant suppression.

With regard to Sparber's request for disclosure, the court has examined in camera the F.B.I. reports regarding its dealings with Napoli from January through the events in question. The reports confirm the essential outlines of the government's initial representations regarding the history of Napoli's involvement as an informant. Accordingly there is no basis for furnishing these reports to counsel prior to trial, at which time, when Napoli takes the stand, they will of course be entitled to review them. 18 U.S.C. §3500.

Bufalino moves to dismiss the indictment on the grounds that the facts set out above preclude proof of an "extortionate extension of credit" as defined in 18 U.S.C. §891(6). The short answer to this is that under 18 U.S.C. §894, the only statute on which the indictment is based, there is no requirement that an extortionate extension of credit be established. Further, any suggestion that the facts alleged do not constitute an offense under §894 because of the possibility that the underlying debt

may itself have been incurred in the course of an illegal scheme by Napoli to defraud Jacobs is without merit. It is a violation of §894 to use extortionate means to collect any extension of credit. Under §891(1),

"To extend credit means to ... enter into any agreement ... whereby repayment or satisfaction of any debt ... whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred." (emphasis supplied)

There is thus no suggestion of a limitation such as that suggested by Bufalino in the language of the statute. Moreover, two courts of appeals have expressly held that the statute includes debts arising out of illegal or deceitful schemes by the debtor to take advantage of the creditor. United States v. Annerino, 495 F.2d 1159, 1166 (7th Cir. 1974) (unauthorized use of credit cards and misappropriation of partnership funds); United States v. Briola, 465 F.2d 1018, 1020 (10th Cir. 1972), cert. denied, 409 U.S. 1108, reh. denied, 410 U.S. 960 (1973) (theft from employer).

For the foregoing reasons, the motions to suppress due to the destruction of the Kel tapes are denied without prejudice to renewal at trial in the event the testimony justifies such a course. See note 2, supra. The other motions are denied.

It is so ordered.

Dated: New York, New York
June 7, 1977.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. He did not specifically compare portions of the two or three recordings of each conversation to learn whether an inaudible portion of the Nagra tape may have been audible on either of the Kel tapes. However, his testimony was emphatic that so far as he noted at the time and could recollect, there was nothing on the Kel tapes which was not also on the Nagras. (Tr. 151-52)
2. Edwards testified that in accordance with standard procedure he personally placed the Nagra device on Napoli's waist and activated it, and that, although the tape had run out, the machine was still in the "on" position when received by the F.B.I. at the conclusion of the conversations. (Tr. 89-90; 98) As a precaution against tampering, the on-off switch was taped in the "on" position and the entire machine was wrapped in evidence tape around the midsection. On its return to the F.B.I. there was no indication that either the machine or the tape had been tampered with in any way. (Tr. 161-63)

The defendants sought to have Napoli, who is currently in the witness protection program, produced at the hearing for examination as to whether or not he interfered in any way with the Nagra recording device either during or after the conversations. This request was denied, but at trial the defendants will be permitted to question Napoli in this regard. Should Napoli's testimony alter the factual basis for today's ruling, the defendants will be permitted to renew their motion to suppress.

3. The court has on numerous occasions in the past heard recordings made over a Kel transmitter and takes judicial notice that such recordings are often of poor quality and rarely of good quality. A technical explanation for the Kel's consistently inferior recording quality was provided by the testimony of the government's expert, Ginsberg.
4. On April 23, 1977 a hearing was conducted with regard to the audibility of the Nagra recordings. Significant portions of all three tapes were played through a filtering device, including, of course, those passages on which the government intends to rely at trial. Although certain short portions were found to be inaudible, the tape was, for the most part, found to be of exceptional clarity as tape recordings of this kind go.
5. It is true that the Miranda court distinguished inadvertent loss from deliberate destruction and stated:

"[T]his is not a case of intentional, deliberate, or bad faith loss or suppression of evidence by government agents in which prophylactic sanctions against the Government would be appropriate. The loss of the tape recording by the agents [in Miranda] was merely inadvertent or negligent." 526 F.2d at 1328.

Although dicta in this passage can be read to suggest that a showing of intentional destruction is alone enough to warrant suppression, for the reasons stated above we disagree with this interpretation.

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EXCERPTS FROM TRANSCRIPT OF TRIAL

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2 UNITED STATES OF AMERICA

3 vs.

4 RUSSELL BUFALINO, et al.

6 New York, August 2, 1977,

7 10:00 a.m.

8 Trial resumed.

9 - -

10 (In the robing room.)

11 MR. GILBRETH: Pursuant to the Criminal
12 Justice Act we are requesting daily copy. Before I
13 made that request I learned that if I order daily copy
14 the government will, and the cost is no more.

15 THE COURT: Your application is approved.
16 I would like to bring in the jury and get
17 started.

18 MS. JONES: I have a couple of matters I
19 would like to bring up.

20 First, I would ask the court to instruct the
21 court clerk, if this is agreeable with your Honor, to
22 ask the spectators in the courtroom to remain in the
23 courtroom until the jurors have not only left the
24 courtroom but have gone into the elevators.

25 THE COURT: I prefer to do that myself.

1 nsa

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2 MS. JONES: I observed it myself yesterday
3 and the spectators were making loud comments out in the
4 hall in the presence of the jurors.

5 Secondly -- we discussed this briefly at
6 one point -- it has to do with the matter eliciting the
7 fact that Mr. Napoli has been relocated on direct.
8 Yesterday, in an opening statement, it was said that
9 Mr. Napoli had been paid \$44,000. Those are moneys
10 paid only in connection with Mr. Napoli's relocation.

11 Mr. Davis intends to cross examine Mr. Napoli
12 fully with respect to relocation. I think it is fair
13 that the government be able to elicit that his sole agree-
14 ment with the government when he came in to testify was
15 that he would be relocated.

16 THE COURT: Who is stopping you?

17 MR. GILBRETH: I previously objected to
18 the government examining Mr. Napoli with respect to
19 payments. I want to withdraw that objection. Now
20 that I have seen that 3500 material I believe I would
21 go into some of the payments.

22 MR. WALLACH: I would like to make a motion
23 that I wanted to make yesterday.

24 At this time I move to dismiss the indictment
25 on the ground of the opening of the U. S. attorney.

A 80
Excerpts from Transcript of Trial

53

1 nsa

2 THE COURT: At the very least, that would
3 only grant a mistrial and not dismiss the indictment.

4 I will see to it that the jury understands
5 what the law is on this case at the time they are re-
6 quired to understand the details in question. If you
7 wish me to make an instruction today to say that the
8 statute in question here does not use the word "extortion"
9 I will.

10 MR. WALLACH: That was not my ground.
11 The ground of my objection is that the U. S. attorney
12 gave a theory of this case to the jury not merely by using
13 the word "extortion" but by openly admitting, as I recol-
14 lect, that Mr. Napoli incurred a debt and that extortion
15 or violation or whatever --

16 THE COURT: Threats of violation.

17 MR. WALLACH: That is not the statute and
18 I move to dismiss the indictment.

19 THE COURT: You and I have differences on
20 that. It's denied.

21 MR. DAVIS: I asked the clerk to talk to you
22 last night.

23 THE COURT: We were in chambers without
24 any lights or water.

25 MR. DAVIS: The young lady you saw in the

A 81
Excerpts from Transcript of Trial

1 nsa

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2 courtroom is Joy Holtz. She has been with us for
3 many years. She had to walk up nine flights of stairs.
4 And I can see why people were irritated. They asked
5 her for money and she promptly brought them cash. They
6 said no, they would not take cash and wanted a check made
7 payable to the party out there. She came immediately
8 upstairs and I made a check out. When she brought it
9 back they said it may not get there on time.

10 THE COURT: What would you like me to do?

11 MR. DAVIS: Direct the marshal's office to
12 do it. Otherwise we will not have the witness here.

13 THE COURT: I will speak to him.

14 (In open court; jury present.)

15 THE COURT: I am sorry I kept you waiting
16 for a while but there were certain legal questions that
17 had to be worked out.

18 As you have noticed, there are some facilities
19 that are not operating properly. In my chambers there
20 are no lights and I gather that here, as in my chambers,
21 there is no water. Since it affects the bathrooms,
22 I am asking the court clerk to see whether there is
23 another courtroom that can be used. I hope by lunch-
24 time to move some place else if it is not cured.

25 I hope the air conditioning will go on again

A 82
Excerpts from Transcript of Trial

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1 nsa

2 too.

3 I want to address comments to those of you
4 sitting in the audience. I am directing that all per-
5 sons in the audience remain in the courtroom five minutes
6 after the sessions end so the jury can go out to lunch
7 without being in the presence of any spectators because
8 it would not be proper for the jurors to be in the
9 presence of spectators at the risk of overhearing conver-
10 sations.

11 Does everybody in the audience understand
12 that?

13 Thank you very much.

14 You may call your first witness.

15

16 (Continued on next page.)

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2 THE COURT: You are free to speculate on that
3 for the record. I will not stop the trial for what probably
4 would be marginal material. If I made a mistake in that
5 regard it is at the government's request and not yours.

6 MR. DAVIS: A motion made for one goes for all
7 and Mr. Gilbreth's motion is for me, too.

8 THE COURT: That's right.

9 MR. WALLACE: May I ask the government when they
10 intend to finish the case?

11 THE COURT: We went into that yesterday. Ms. Jones
12 said if we keep moving along after the cross-examination
13 of Mr. Napoli the other witnesses and evidence should
14 take no longer than a day. I may go late this afternoon.
15 This is Wednesday already.

16 MR. DAVIS: We will do everything to cooperate,
17 your Honor.

18 THE COURT: Would you give your name?

19 DEPUTY CLERK: Grace DeGeorgio.

20 BY THE COURT:

21 Q You are the deputy clerk?

22 A Yes.

23 Q Tell counsel what you told me a moment ago about
24 the statements made to you by members of the jury.

25 A The jurors called me into their room and they said

1 nshh

2 they are quite nervous. They seem to, every time they
3 go in or out a couple of the spectators are glaring at
4 them. They said no matter where they went they kept
5 bumping into these people, elevators, outside.

6 THE COURT: I would like counsel's reaction. I
7 don't intend to tolerate any psychological pressure
8 to be exerted on this jury. I have been myself unhappy
9 by the tone set by the presence of some persons in the
10 audience. I am not talking about the defendants themselves
11 or members of the family as far as I am able to judge
12 who their family members are.

13 MR. WALLACH: The only spectators I know in
14 this courtroom are my client's wife and daughter.

15 THE COURT: They are not the only spectators.

16 MR. WALLACH: The only spectators I know. My
17 client does not consort with anyone except Mr. Frankel
18 or his wife or daughter. Frankly, they don't even speak
19 even during the trial.

20 THE COURT: There are some other people here
21 besides those people.

22 MR. DAVIS: I am concerned about this statement
23 because I feel at this point this jury would be highly
24 prejudicial in view of the type of case it is. There are
25 spectators in the courtroom and I noticed that my client

1 nshh

2 has his cousin, William Bufalino, a member of the bar
3 for many, many years who has tried cases here and is out
4 of Detroit, is here today. There are some friends of theirs
5 here. Other spectators I don't know. There is a fellow
6 with bushy hair. Yesterday morning I had a cup of coffee
7 at the patio at Ferrara's. I noticed jurors and we went
8 over to another table. That can't be helped. If that
9 is the statement of the jury I would have to move for a
10 mistrial and ask that a new jury be picked.

11 MS. JONES: I don't believe a mistrial is called
12 for at all. I asked the Court to ask the spectators
13 to remain in the courtroom because various members of
14 the government prosecution team noticed the activities
15 of the spectators. In fact Mr. Napoli informed me yesterday
16 that spectators were making various gestures at him during
17 his direct testimony yesterday afternoon. I would suggest
18 at this point that the jury, if not be sequestered, certainly
19 be kept together at the lunch time and be sent to lunch
20 with a marshal as opposed to allowing them to go off in
21 their own direction. Perhaps some sort of statement to
22 the spectators by the Court would be called for at this
23 time.

24 THE COURT: I agree with your suggestions which
25 are not necessarily inconsistent with other things. Mr.

1 nshh

2 Davis, if you want I will question every member of the
3 jury to determine whether or not they believe whatever
4 complaint has been made would prevent them from rendering
5 a fair judgment in the case.

6 MR. DAVIS: In view of that statement if she
7 has heard it from a number of jurors, I know there are
8 federal agents sitting in the courtroom --

9 THE COURT: My guess is that they are not federal
10 agents. There are people sitting in the back of the
11 room whom you can't see but I can see who are not dressed
12 as federal agents and almost certainly are not. They are
13 without jackets and ties. They are husky and menacing
14 looking people in the eyes of some who have not seen such
15 persons before. They include one or two men who laughed
16 out loud during the first day of the trial. I did notice
17 last night that one or two of them were getting into the
18 car with Mr. Bufalino when he was driving off. I assume
19 they are in his group.

20 MR. DAVIS: This is what disturbs me. If a
21 number of the jurors have made such a statement and I
22 represented Mr. Bufalino once before and he conducts himself
23 in a proper manner. We never had a complaint like this
24 before. I went through a 14-week trial with him.

25 THE COURT: Mr. Bufalino who I have never seen

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2 before this trial seems to behave with complete decorum.

3 My remarks are not intended to describe him at all.

4 MR. GILBRETH: I have two requests. First in
5 answer to the Court's question I request that the jurors
6 be examined on voir dire as to whether or not anything has
7 happened during the course of these proceedings that would
8 inhibit their ability to decide this case fairly. Second,
9 if the Court's clerk or the Court could ask the court clerk
10 about any person whom can be identified. I don't want
11 the jurors examined as to this, unless the Court wants
12 to do it, if there is a spectator in here that is threatening
13 or alarming the jury or anything else I would suggest
14 that the Court would bring that person into the courtroom
15 and not be present on trial. I would consent to that
16 proceeding.

17 MR. DAVIS: I will do likewise. The only thing
18 I am concerned about, your Honor, is that with the statement
19 that has been made with some jurors here and the type of
20 trial and the nature of the offense I don't think we can
21 get a fair trial here any longer.

22 THE COURT: If I conclude that I will take
23 the appropriate action. I will not take your conclusion
24 based on no action.

25 MR. DAVIS: I would not assume you would.

1 nshh

2 THE COURT: I think it is better for me to question
3 them on my own and on the record. I think with these many
4 people it would make them nervous with all these people
5 around. If any create apprehension it will be on the
6 record.

7 MS. JONES: Mr. Wallach, you are in agreement
8 with this procedure?

9 MR. WALLACH: I would request specifically, if
10 you can, that you advise the jury that I represent one
11 defendant and this is solely upon the court.

12 MR. DAVIS: Barbara said she would like to reopen
13 her direct for a couple of questions.

14 MS. JONES: Three short questions.

15 MR. DAVIS: We have consented. It has to do
16 with his arrest convictions.

17 MS. JONES: There has been a U.S. marshal in the
18 courtroom for the protection of Mr. Napoli. He has been
19 inconspicuous and there has been at least one FBI agent
20 and no more than two during the course of the trial.

21 THE COURT: Thank you.

22 (Counsel left the robing room.)

23 THE COURT: Give us your name?

24 A Dorothy L. Henry.

25 BY THE COURT: (Addressing Miss Henry)

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2 Q I have been having discussions here about
3 the trial. Has anything come to your attention which would
4 interfere in any way with your deciding this case just
5 the way you believe it ought to be decided?

6 A I have taken notice to three of the big guys
7 that sit over. At first I thought they were part of
8 the jurors. When they first started talking while I was
9 sitting back and since I was elected I found they wasn't
10 part of the jury. I find they continue to talk as of
11 yesterday. We were taking the elevator down for lunch
12 and it was a little slow about coming. I said when is Con
13 Edison going to send me a bill for this month. The big
14 guy, blond silver hair fellow says oh, yes, just like that
15 case going on in there. They are trying to get \$40,000
16 for some tax something. I saw where he was coming from
17 and I hushed immediately. He brought me back to Monday.
18 Everywhere the three of us went yesterday we saw one or
19 two. Then another one, also. I brought it to the rest
20 of the jurors' attention. Had it happen to them and while
21 they are sitting back there all the time they are making
22 eyes and they are smiling.

23 Q Have they influenced you in any way? I am glad
24 to hear what you have said.

25 A I am for law and peace.

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2 Q You are not in any fear about the situation?

3 A No. I thought I would make myself available.

4 Q You are right to do what you have done. I am
5 pleased that you have done it. I will check with the other
6 members of the jury. Thank you very much.

7 A You are quite welcome.

8 (Juror number 1 left the robing room.)

9 BY THE COURT: (Addressing Ms. Silver)

10 Q Please sit down. Would you tell us what your
11 name is?

12 A Millie Silver.

13 Q The forelady told me that she had discussed
14 with you the fact that some spectators in the trial have
15 talked in the presence of some of the jurors and have perhaps
16 smiled at them or something like that. Had you noticed
17 anything like this on your own before she mentioned it?

18 A No.

19 Q Has anything occurred in your experience which
20 would influence you in any way with regard to the trial
21 in this case and prevent you from deciding it fairly?

22 A No.

23 Q Thank you very much.

24 (Ms. Silver left the robing room.)

25 BY THE COURT: (Addressing Ms. Scheps)

1 nshh

2 Q I am questioning all the jurors because one
3 or two of them have been in the presence of spectators
4 who have made statements and perhaps noticed smiles and thing
5 like that in the courtroom. Has that happened to you?

6 A No. Not at all.

7 Q Is there anything that has happened?

8 A They look at you when you go in and out of the
9 jury box.

10 Q Has that influenced you at all?

11 A No.

12 (Ms. Scheps left the robing room.)

13 BY THE COURT: (Addressing Ms. White)

14 Q We are questioning each one of the jurors.
15 The sole question is whether in your presence any of the
16 spectators have made any statements or whether in court there
17 have been any gestures in any way which would affect
18 you in the case?

19 A We were going out for lunch yesterday.

20 Q Were you going out with Miss Henry?

21 A Yes. He was speaking to her.

22 Q You were in on that?

23 A Yes.

24 Q Is there anything else?

25 A I was in the ladies' room. There were three of

1 nshh

2 us and that was the first day, Monday, and a young girl came
3 in and she was just standing there.

4 Q Did she say anything?

5 A No. She just stood there.

6 Q It was some other than a member of the jury?

7 A Yes. She was one of the spectators.

8 Q Does anything that has happened make you feel
9 that you could not render a fair verdict in the case?

10 A No.

11 Q That is what I wanted to be sure of. I am sure
12 that although the jury understands it, the Court will be
13 sure that everything is okay. Thank you very much.

14 (Ms. White leaves the robing room.)

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2 (Alexander Coleman entered the robing
3 room.)

4 BY THE COURT:

5 Q As you know, we are calling everyone in to
6 ask them?

7 A Right.

8 Q Have you been in the presence of any specta-
9 tors when they have made any statements?

10 A Yes, sir.

11 Q What happened?

12 A When you dismissed us Monday in the afternoon
13 I went into the men's room. In there he either followed
14 me or he was already in there --

15 Q The jury men's room?

16 A The outside one, the public one.

17 One of these fellows that sit in the back
18 asked me, "You know, I don't understand about this
19 thing, can you explain it?"

20 I said, "I'm sorry. I'm a juror and
21 can't talk to you."

22 He said, "I'm sorry," and we cut it right
23 there.

24 I know this one other thing since we have
25 gotten into the jury box. Every time we go back into

1 nsa2

2 the jurors' room they try to make eye-to-eyeball contact
3 with you. When I first spotted that I turned my
4 face away. I don't allow them to do that to me.

5 Q You are doing the right thing.

6 A I warned them. I sensed it from the be-
7 ginning. As soon as I saw this eyeball-to-eyeball
8 contact I said: don't look them in the eye.

9 Q I am glad you are so realistic.

10 Would this influence your judgment on the
11 issues of the case, sir?

12 A No. I will still listen to the entire
13 case and make my own judgment.

14 Q Thank you very much?

15 A Okay.

16 (Alexander Coleman left the robing
17 room.)

18 (Dennis Krieger entered the robing room.)

19 BY THE COURT:

20 Q Did you sign your slips?

21 A Yes.

22 Q I am calling everybody in to ask them
23 whether they have been in the presence of any spectators
24 when attempts were made or whether they feel any
25 action of the spectators is something that they have

1 nsa3

2 noted?

3 A Nothing that would be of interest really.

4 Q Some members of the jury have been present
5 when spectators have made statements which in my opinion
6 don't warrant taking any action. I want the facts.
7 That has not happened in your case?

8 A Correct.

9 Q Thank you.

10 (Dennis Krieger left the robing room.)

11 (Pablo Valentine entered the robing room.)

12 BY THE COURT:

13 Q I am calling all the members of the jury in,
14 as you know, to ask them whether any statements have
15 been made in their presence by spectators who are
16 sitting here at the trial or whether anything else has
17 happened along those lines that you want to report
18 to me.

19 A This morning in the jurors' room there was
20 a discussion about quite a few guys, jurors, being
21 followed. I suggested they bring it up to you.

22 Q That is a good idea. Have you had any
23 first-hand experience?

24 A No problem.

25 Q Nobody has talked to you?

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2 A No. I don't talk to anybody about it.

3 Q Nobody has given you any looks or anything?

4 A No.

5 Q Thank you.

6 (Pablo Valentine left the robing room.)

7 (Miss Sledge entered the robing room.)

8 BY THE COURT:

9 Q I have asked members of the jury to come
10 in because some of them apparently have heard state-
11 ments made to them or in their presence by spectators
12 in court or have reported other items.

13 Is there anything you have to report of that
14 kind?

15 A I haven't heard anything. I did observe
16 the young lady sitting in the front row.

17 Q What about it?

18 A She came into the ladies' room while in
19 use by the jurors.

20 Q That was the regular ladies' room?

21 A Right. Because of the water.

22 Q Did she speak to anybody?

23 A No.

24 Q There is nothing that happened that would
25 influence your judgment in this case in any way, is

1 nsa5

2 there?

3 A No.

4 (Miss Sledge. left the robing room.)

5 (Amparo Ortiz entered the robing room.)

6 BY THE COURT:

7 Q I am asking everybody to come in to tell me
8 whether any statements were made in their presence or
9 to them by members of the audience here, or whether any
10 other thing has happened that you want to report to me.

11 A Yesterday, when we went out for lunch, there
12 were two heavy fellows outside. The elevator was
13 delayed. And then they said something to two of my
14 companions, two jurors. I didn't pay attention.

15 Q Did you hear what they said?

16 A No. I don't want to pay attention to
17 them and I looked the other way. They followed the
18 next time. We saw him around. There was a girl in
19 the ladies' room.

20 Q That has been told to me. She didn't say
21 anything?

22 A No.

23 Q Is there anything that has happened that would
24 affect your judgment?

25 A No. When we go in and out they start

1 nsa6

2 staring in some way that we don't like.

3 Q I will see what I can do about that. Thank
4 you.

5 A Thank you very much, your Honor. Good morn-
6 ing.

7 (Amparo Ortiz left the robing room.)

8 (Thelma Daniels entered the robing room.)

9 BY THE COURT:

10 Q Miss Daniels, as you know, I have called
11 everybody in to find out whether any statements were
12 made in their presence by any spectators or any events
13 occurred.

14 A I have nothing to report. I have not heard
15 from anybody or spoken to anybody.

16 The little girl who has gone in the wash-
17 room when we were all there said nothing. That was
18 the only incident.

19 Q Thank you.

20 A You are welcome.

21 (Thelma Daniels left the robing room.)

22 (Joseph Perfetto entered the robing room.)

23 BY THE COURT:

24 Q I am sure you know by now that I have
25 called everybody in to find out whether they have been

1 nsa7

2 in the presence of any spectators when statements were
3 made or anything else occurred that they wanted to
4 report.

5 A I have nothing to report.

6 Q Very good. Thank you.

7 (Joseph Perfetto left the robing room.)

8 (Roger Worth entered the robing room.)

9 BY THE COURT:

10 Q You are the last of the regular jurors for
11 me to ask whether any statements have been made by any
12 of the spectators in your presence or whether any other
13 items occurred which you would want to report to me.

14 A No, sir, no statements.

15 Q Anything else?

16 A I think it's sort of an unnerving feeling
17 looking at the crowd in the back.

18 Q Is that because you feel there has been
19 a conscious effort on the part of any individual to make
20 their presence felt or just because --

21 A I wouldn't say that.

22 Q It's just because there are big, husky
23 people there?

24 A Yes, sir.

25 I grew up in the streets of New York and you

1 nsa3

2 get a feeling sort of of types. I am not saying I'm
3 right, of course.

4 Q Could you say whether that situation, in
5 your opinion, would affect your judgment in voting on
6 this case?

7 A No, sir, it would not.

8 Q Thank you.

9 A Thank you.

10 (Roger Worth left the robing room.)

11 (David E. Napper entered the robing room.)

12 BY THE COURT:

13 Q I have called everybody in, as you know, to find
14 out whether any statements were made in your presence
15 by any spectators or whether there are any other items
16 to report on the part of the conduct of the spectators that
17 have come to your attention.

18 A I have nothing to report at all.

19 Q Thank you.

20 (David E. Napper left the robing room.)

21 (David Breswell entered the robing room.)

22 BY THE COURT:

23 Q You are the last one, Mr. Breswell. I have
24 been asking everybody whether any statement has been
25 made by any spectator here in your presence or whether

1 nsa9

2 anything else has happened on the part of the
3 spectators that you want to report to me.

4 A No, not at all.

5 Q You haven't heard them say anything?

6 A No.

7 (David Breswell left the robing room.)

8 (All counsel entered the robing room.)

9 THE COURT: Counsel, I have completed my
10 examination of each of the 14 jurors, one by one. With-
11 out attempting to be entirely specific, but giving all
12 the detail that I think is necessary, I would say that
13 there are three or four jurors who have had any contact
14 whatsoever with any of the spectators except for the
15 fact that yesterday, during the time when there was
16 difficulty with the water in the building, one of the
17 young lady spectators used the same bathroom as one
18 of the woman jurors. There was no conversation whatso-
19 ever and none of them claimed that the spectator did
20 anything she shouldn't have done.

21 As far as other spectators are concerned, the
22 situatin is somewhat different. It is clearly with
23 reference to the same one or two men that I was talking
24 about this morning that have the following to report:

25 Miss Henry, the forelady, Miss White, and

1 nsal0

2 perhaps one other woman member of the jury, I think
3 there is Ortiz, were going out of the building yesterday
4 and a statement was made by one of the men in their
5 presence, not necessarily relating to the subject matter
6 of the case, but an attempt, they felt, to perhaps start
7 a conversation, which they refused to follow through
8 on.

9 In addition to that, Mr. Coleman, the big,
10 burly, humpty-dumpty gentleman, reported specifically
11 that one of the men in the audience attempted to start
12 a conversation with him. Mr. Coleman said he didn't
13 want to have anything to talk about. This was in
14 the men's room yesterday I believe.

15 Every member of the jury assured me, in
16 such a way that I was terribly satisfied, that it was
17 true that none of them were intimidated in any way.
18 There was one juror who said that although no particu-
19 lar incident occurred he felt that there was some
20 sense of uneasiness. He had grown up on the
21 streets of New York. This is Mr. Worth, I believe.
22 His experience added to what existed in the courtroom
23 and it created a sence of uncase.

24 When I asked him if it affected him in such
25 a way not to render a judgment unaffected by the atmo-

1 nsall

2 sphere that he described, he said there was no problem
3 of that kind. I asked him if there was anything
4 he had to report; that is what he reported.

5 Except for the people that I have mentioned
6 I think everybody else denied any statements made in their
7 presence, any looks or so forth.

8 There were references among the people I
9 referred to of looks in their direction which they con-
10 sidered to be more than casual.

11 I am satisfied that in spite of the fact that
12 there is some affirmative material which I have just
13 brought to your attention that the jury is intact and
14 it has not been adversely affected in the degree that
15 would require even serious consideration of a mistrial.
16 For that reason, Mr. Davis, your motion is denied.

17 I would like to make a statement in open
18 court before the jury is brought back that there have
19 been reports made of statements made by spectators in
20 the presence of, if not addressed to, jurors.

21 There has been a report by at least one
22 juror there are purposely looks going to the jury. The
23 behavior may be innocent, but if it is not innocent
24 it could constitute a violation of the law.

25 I expect the instructions of the court to be

1 nsal2

2 followed and, if not, I would be required to take
3 action.

4 MR. DAVIS: I am unhappy about your rul-
5 ing. I don't feel we can get a fair trial.

6 I have to say at this point -- and your
7 reputation is for being one of the greatest guys around
8 here; I want you to take what I am saying in context
9 of that -- I do feel, your Honor, in an attempt to try
10 to get the trial over with by the end of the week we are
11 pushing this to such an extent that we will not get
12 finished. We are being pushed and I don't think it
13 is fair to anybody in here.

14 We have discussed it outside. If you do
15 go ahead, and I go ahead reluctantly and it is your
16 Honor's decision and I must go, that you would consider --
17 and I understand it is your habit to break on Friday --
18 but to break Thursday night and come back on Wednesday
19 because your Honor has to be away.

20 THE COURT: I don't think this case
21 is being pushed unduly. I felt some pressure yesterday
22 with all the casualties that occurred. We had bomb
23 scares and one thing or another, which may not have
24 anything to do with the case, but in reflection we have
25 really only started to sit on the trial for two days.

1 nsal3

2 We started Monday at 10 until 4:30. We went from
3 10 o'clock yesterday until 5 o'clock.

4 Many judges push much farther, and I might
5 have to do that too. If it turns out that we have
6 to go farther and not end by Friday, we will go farther.
7 If I can't attend the Judicial Conference meeting in
8 Chicago, I won't attend it. I will not split a
9 criminal jury trial for a whole week unless it's the
10 last resort required.

11 I once did that where I granted the defense
12 the right to make chemical tests in a narcotic case
13 which they could not have any reason to have known
14 that they would make it before that time, and could
15 not be made except with a break of a week or ten days.

16 Except for a very extraordinary circumstance
17 like this it doesn't apply to just anybody.

18 MR. GILBRETH: First, may I be heard
19 briefly with respect to the possibility of a mistrial,
20 or has your Honor concluded on that? I have some
21 observations that I would like to share with the court
22 briefly.

23 The matter may come up again. I am very
24 distressed about the situation because what has hap-
25 pened here is that without any cross examination yet of

1 nsa 249

2 Mr. Napoli the government has effectively put in its
3 case, and it appears to me that what the jurors may
4 have in their minds is that this is an organized crime
5 case, this is a Mafia case, this is the kind of case
6 in which the spectators will intimidate them. I am
7 afraid that that will stay with them.

8 I don't know, from what your Honor has told
9 me, whether or not the jurors have discussed among them-
10 selves these things.

11 THE COURT: They have discussed it among
12 themselves. One of the jurors, who was in the
13 majority who had not had any contact of any kind with
14 any spectator or felt affected in any way, said, "Take
15 it up with the judge." Everything has been out in the
16 open with each juror. I called each juror in with the
17 purpose that we have discussed.

18 MR. GILBRETH: I have nothing further at
19 this time, your Honor.

20 MR. WALLACH: May I address your Honor?

21 THE COURT: Yes.

22 MR. WALLACH: I represent, as you know,
23 Jacobs. I am not only moving for a mistrial -- I know
24 your Honor has ruled against it; I am taking exception --
25 but I would also request your Honor alternatively to sever

1 nsa

2 the case against Jacobs. He has no friends but just
3 family. They have been menacing nobody. I don't
4 see why my client should be affected at all by whatever
5 the jury may think or may not feel or may observe by way
6 of ominous glances toward them. That is purely
7 subjective on the part of the jury, and Mr. Jacobs is
8 not responsible for that.

9 With all due respect to your Honor's
10 ruling, and I know your Honor is fair, except for the
11 technicalities raised, I object to that. I do feel
12 my client will not get a fair trial before this jury.

13 If I am not successful, I ask your Honor to
14 consider that the juror who grew up on the streets --
15 I hope that is the idiom -- he may now have a certain
16 empathy with the government's chief witness and unduly
17 prejudiced against my client because he is linked up with
18 the others. He grew up on the streets and is
19 apparently very sophisticated --

20 THE COURT: While there is a certain facial
21 logic to the motion, there is no logic. If you are
22 right that you won't get a fair trial, nobody else will.

23 You say it's all right for them not to get
24 a fair trial because they caused it and you did not. On
25 reflection that doesn't make sense.

1 nsa

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2 I have ruled that even if the jury thinks
3 they are connected with members of the audience they will
4 get a fair trial. Those who the jurors will
5 think are people who are connected with people in the
6 audience will get a fair trial.

7 By late this afternoon there will be available
8 the transcript of my interrogation of the jurors. At
9 least Mr. Gilbreth will have a copy of that.

10 MR. DAVIS: We ordered daily copy.

11 THE COURT: You can look it over, and
12 tomorrow morning if you want to make any further requests,
13 you can

14 MR. DAVIS: I wanted to take exception to
15 the remark that they caused it.

16 THE COURT: I didn't say that.

17 MR. DAVIS: That was the inference of Mr.
18 Wallach, that my client may have caused it.

19 THE COURT: I believe that people about
20 whose conduct any remark was made by the members of the
21 jury who did make any remark were in the entourage,
22 company of Mr. Bufalino. No juror attributed any asso-
23 ciation between any spectator and any defendant.

24 I am saying what I am saying because they
25 talked about large men, to describe who they were talking

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Excerpts from Transcript of Trial

1 nsa

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2 about. Since I happened to have seen last night
3 that some of the large men in the audience were in the
4 company of Mr. Bufalino, I give you those facts for
5 whatever you wish to do with them.

6 MR. DAVIS: In view of that, I renew my
7 motion for a mistrial. I don't think we can get a
8 fair trial.

9 MR. GILBRETH: I do too. I think the
10 jurors -- and that is why they were allowed to leave
11 the room five minutes in advance of the spectators -- my
12 fear is that the jurors have the same association that
13 the court does. That is the basis for the court's
14 earliest ruling that the jurors had to leave five
15 minutes before the spectators, because I had seen Mr.
16 Bufalino.

17 THE COURT: The jurors do associate
18 these people with Mr. Bufalino. The important ques-
19 tion is not whether they associated them with anybody
20 or not but what their reaction to what has happened
21 has been.

22 I am satisfied that the reaction has been
23 that this is a nuisance, putting it at the worst;
24 I don't like people looking at me, and they are not
25 supposed to talk to me, and they did. If you can

1 nsa

2 get people to stop looking at me, I would like you to
3 do it. I am not affected in my judgment. I will
4 go ahead with my duty.

5 MR. DAVIS: I am afraid --

6 THE COURT: We are not going to talk about
7 it forever. It is important to your clients and you
8 are quite right to make the motion you have made. I
9 have to make a judgment as to an effective determina-
10 tion and I have.

11 MS. JONES: The government would move for
12 a sequestered jury at this point. We have to do
13 something to safeguard the jury from any further con-
14 tact.

15 MR. WALLACH: I oppose that motion.
16 That will aggravate the situation.

17 THE COURT: I think, Miss Jones, if a
18 request was made at the beginning of the case when the
19 situation would have been neutral I would have granted
20 such a motion, or might have granted it. If I felt
21 the security of the jurors was in any way impaired, I
22 would also grant your motion.

23 My feeling is that that is not the case.

24 MS. JONES: Could I ask as a secondary
25 measure that at least the jurors be kept together with

1 nsa

2 a marshal at lunch, and also perhaps that they be
3 assembled together on the first floor and brought up in
4 the elevators?

5 THE COURT: What I will do is this:

6 At least for the next couple of days, because it will
7 save time too, is to arrange to have lunch brought in
8 for the jurors. It takes quite a while to take them
9 back and forth. That can be done to speed up the
10 trial.

11 MR. DAVIS: I do object to the fact that
12 the practice they have been following be changed. That
13 would highlight the incident.

14 THE COURT: To that extent I will change
15 the practice.

16 MR. WALLACH: I would like the record to
17 show not only have Mr. Frankel and I avoided the jury
18 but my clients have been told to keep away.

19 THE COURT: You are right to put your
20 position on the record. Maybe some other court
21 reviewing this would think that I was not correct.

22 I am convinced that there is no reason
23 for alarm here and we will go ahead with the trial.

24 MR. DAVIS: The only thing that con-
25 cerns me is this business about court review. It

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looks like somebody has formed a union because this
jury has formed an opinion.

THE COURT: I don't follow you.

(Continued on next page.)

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Excerpts from Transcript of Trial

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1 bma

2 jury.

3 We will excuse the witness.

4 MS. JONES: Thank you, your Honor.

5 (Witness excused.)

6 MR. DAVIS: If your Honor please, may I
7 have one minute.

8 THE COURT: Sure.

9 MS. JONES: Your Honor, at this time the
10 government rests.

11 THE COURT: Ladies and gentlemen, the govern-
12 ment has just announced it has rested, which means it
13 has finished its evidence in chief. At this time I
14 have certain matters to discuss with counsel. You may
15 retire to the jury room.

16 (The jury left the courtroom.)

17 THE COURT: Mr. Davis, may I have your
18 attention. Do you wish to make a motion at this time?

19 MR. DAVIS: I move to dismiss on the grounds
20 the government has failed to make out a prima facie case.

21 MR. WALLACH: I move for a judgment of acquittal.
22 I would submit to your Honor that the government's evi-
23 dence should not be submitted to the jury in regards to
24 Mr. Jacobs. I don't think that reasonable people
25 can differ on Mr. Jacobs.

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Excerpts from Transcript of Trial

1 dna

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2 I think that Mr. Napoli -- and I am only
3 talking about my client -- is inherently incredible.
4 With regard to Mr. Jacobs, I don't think the government
5 made out a case of any extortionate credit or any
6 extortion on the part of Mr. Jacobs.

7 Recognizing Rule 2 and the rules of conspiracy,
8 I say despite that factor I think that one has to assess
9 Mr. Jacobs' role in acting as an individual, whether he
10 entered an arrangement or colluded with an illegal
11 purpose in mind. I think the evidence is ambiguous
12 and consistent with innocence. I believe it is the
13 U.S. v. Robinson and they considered evidence which was
14 ambiguous.

15 I would submit to your Honor that it should
16 not be submitted to the jury. I don't think reason-
17 able minds can differ in regard to guilt or innocence.
18 I think on no view of the facts is Mr. Jacobs liable
19 under both counts.

20 THE COURT: The motion is denied because
21 of my view that if Mr. Napoli believed, which is of course
22 up to the jury, a reasonable juror could believe that
23 Mr. Jacobs conspired with his co-defendants and carried
24 out the acts stated in the indictment.

25 MR. WALLACH: I believe I stated the

1 bma

2 basis of the rule correctly.

3 MR. GILBRETH: I would like to make three
4 motions. One for the record, to perfect my record,
5 and I would like to make argument briefly.

6 First, your Honor, at this time I renew
7 my motion for a mistrial, and in the alternative I move
8 to strike the direct examination of Mr. Napoli because
9 of the government's deliberate destruction of the re-
10 cordings. I anticipate your Honor ruling on that.

11 THE COURT: I don't know if it is necessary
12 to restate the motion but it is perfectly proper to do
13 so. I find no reason to act any differently now than
14 I have in the past. That motion is denied.

15 MR. GILBRETH: Secondly, I move and renew
16 my motion earlier made for a mistrial because of the
17 cumulative events that I think have unfairly prejudiced
18 this jury.

19 First, I have now reviewed your Honor's
20 in camera voir dire of the jurors and it is apparent that
21 they are uneasy and they have used other words stronger
22 than that.

23 THE COURT: I think only one juror did.

24 MR. GILBRETH: Your Honor, to continue,
25 it seems that they have discussed amongst themselves

1 bma

2 these episodes in which, as I gather, three or four, if not
3 more jurors, believed that people have tried to
4 deliberately engage them in conversation and those are
5 the same people that have given them glances which they
6 feel uncomfortable about. I think there is sufficient
7 showing that the jury is somehow associating without
8 substance these activities with one or more of the
9 defendants on trial.

10 I further, your Honor, think that that
11 potential for prejudice is exacerbated by the fact that
12 the government has called in Agent Moody, who testified
13 that the Federal Bureau of Investigation has been in-
14 volved and engaging in conversations with Mr. Russell
15 Bufalino since 1973. I think the cumulative fact is
16 prejudicial in addition, your Honor.

17 I am informed that during some of the
18 periods that we have been as counsel in the robing room
19 with your Honor the jurors have been discussing some
20 aspects of the case. I don't know whether they have
21 gone into the substance of it or if it is idle conversa-
22 tion. I don't have first-hand information as to that.
23 But I think agents of the government have been in this
24 room when we were in the robing room.

25 THE COURT: Mr. Gilbreth, the last state-

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Excerpts from Transcript of Trial

1 hma

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2 ment you made, when was that made known to you?

3 MR. GILBRETH: Only within the last 15
4 minutes.

5 THE COURT: We will have to discuss what
6 to do about that. May I find out the source of the
7 information?

8 MR. GILBRETH: My client, who is seated
9 in the courtroom.

10 THE COURT: Yes. I don't know but I assume
11 so.

12 Anyway, the motion you make is denied. I
13 am quite satisfied, as I said I was in the robing room,
14 but on the record now.

15 Of course you know the jurors stated that
16 there was not any reason to believe they couldn't follow
17 through on their obligation to render a fair verdict
18 in this case based only on the evidence that they heard
19 in this courtroom and on the judge's direction to them
20 in law.

21 I was quite concerned about the subject.
22 By which I mean to say that such a subject always
23 requires the court to be very careful to be sure that
24 no serious damage, or damage of any kind, has been done.
25 I don't believe that any has.

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Excerpts from Transcript of Trial

1 bma

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2 I want to point out too that we were only
3 into the case and it would be an easy thing to start
4 all over again.

5 I'm convinced that the jury was not adversely
6 affected by such matters as were brought to my atten-
7 tion.

8 (Continued on next page.)

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2 I should add this is two days later and I am sure
3 the jurors would advise me or those members of the jury who
4 advise me in the first place if they had further concern.
5 They have not. I will comment on the fact that I
6 believe the tone of the courtroom has been much improved
7 in the last few days also. Your motion is denied.

8 MR. WALLACH: Excuse me, your Honor. May I be
9 considered as joining in that motion?

10 THE COURT: Yes. All of you may be.

11 MR. GILBRETH: My third and last motion at
12 this time is to move to have the indictment dismissed as
13 a matter of law. The charges against these three defendants
14 are two. The first is a conspiracy to use extortionate means
15 to collect an extension of credit and the second, the
16 substantive count which the court is aware of. With respect
17 to both there need be an extension of credit. I can argue th

18 THE COURT: I don't think there is any dispute
19 on the government's part, there is not on mine, that there
20 must be an extension of credit.

21 MR. GILBRETH: Then I am not elaborating on that
22 point. My point, your Honor, is that the testimony of
23 Mr. Napoli, and I will not comment on his credibility at
24 this point, if believed, is in substance that he without any
25 activity of the government at that time, according to his

1 bmhh 2
2 testimony, obtained property from Mr. Jacobs by larceny,
3 by trick, he stole it and he admitted in my cross-examination
4 that the efforts of the defendants were directed to obtain
5 the return of that stolen property. I don't see as a matter
6 of law any extension of credit. To amplify the situation
7 when he was pressed further he said that he had been given
8 the jewels by a man he identified as Mr. Frank Marmel
9 and in connection with that he submitted to my client
10 and to others a pawn ticket which had been forged by
11 the witness and which he conceded was forged taking his
12 testimony especially where he later admitted that was
13 false, what has happened is that the government witness
14 has come in and admitted under oath that he stole the
15 jewelry from Mr. Jacobs and if believed, his testimony
16 was to the substance that these three gentlemen were trying
17 to obtain the return of the stolen property.

18 There did come a time when Mr. Napoli interjected
19 first with the story that his father would provide the
20 funds and second, with the story that his mother would provide
21 the funds, that he would pay for the jewelry rather than
22 returning it and then they get into discussions and
23 he counts out money provided by the federal government.

24 So my argument is that there is no extension
25 of credit and this indictment should be dismissed.

1 bmhh 3

2 MR. DAVIS: I join in what Mr. Gilbreth has said.
3 I want to add one more item to your Honor's consideration.
4 The testimony has shown that this was a common scheme
5 of this fellow's to go out and swindle people all over in
6 various places and they did not extend credit to him. The
7 same transaction happened in California that happened with
8 Jacobs but there the people that went out to get the
9 return of the jewelry were the U.S. Marshals. I join
10 in on that motion.

11 THE COURT: And Mr. Wallach does too.

12 MR. WALLACH: I don't want to repeat but I
13 would like to add something.

14 THE COURT: If you want to add that's fine.

15 MR. WALLACH: Your Honor, as I understand
16 the congressional intent was to protect the consumer.
17 This act was primarily made as I understand from the
18 ambiguous legislative hearings and comments dealt with
19 loan sharking, dealt with gambling debts, dealt with
20 a voluntary extension of credit and I think that was the
21 aim of the legislation. I think Mr. Galbreth put it more
22 completely than I did but I want to corroborate what he
23 said. I don't think the Congress had in mind a person
24 like Mr. Napoli. Notwithstanding that Congress had the
25 jurisdiction to go into certain classes or types of activities.

1 bmhh 4

2 I don't think that Congress nevertheless wanted to interfere
3 with something that is local and within the province
4 of the state authorities which is assault and extortion.

5 I submit to your Honor that this is not the type of
6 case that comes under that statute.

7 THE COURT: Thank you, Ms. Jones.

8 MS. JONES: Yes, your Honor.

9 THE COURT: Is there any reason I could not
10 tell the jury to go to lunch?

11 MR. GILBRETH: I know of none.

12 MS. JONES: Your Honor, under Title 18, Section
13 891 which is the definition section for the violation
14 charged here, Section 894, Section 891, subsection 1,
15 to extend credits defined as to make or renew any loan
16 or enter into any agreement tacit or express whereby the
17 repayment or satisfaction of any debt or claim whether
18 acknowledge or disputed, valid or invalid, or however
19 arising may or will be conferred.

20 The government contends that Mr. Napoli's
21 obligation to Mr. Jacobs here was one for \$25,000. How it
22 arose is irrelevant under this situation.

23 THE COURT: More to the point how it arose is
24 irrelevant in the sense that it does not have to be a
25 voluntary act on the part of the creditor, is that correct?

1 bmhh 5

2 MS. JONES: Correct, your Honor. And furthermore
3 within the facts of this case I believe your Honor can
4 find that it becomes clear that Mr. Jacobs certainly ex-
5 pected repayment of the money farther down the line
6 and Mr. Napoli accepted the obligation and in fact began
7 repayment.

8 THE COURT: When would you say that occurred?

9 MS. JONES: Certainly by the 16th when Mr.
10 Sparber accepted the first thousand dollars. Furthermore,
11 your Honor, there are at least two cases with respect to these
12 and one is United States v. Briola. In that case the court
13 found in the situation where the debtor had in fact stolen
14 the credit card of the creditor and run up a series of
15 debts and the creditor came after him and attempted to
16 get him to pay the debts, the court found that that
17 was an extension of credit within the meaning of Section
18 894.

19 MR. GILBRETH: Your Honor, may I be heard briefly?

20 THE COURT: I will hear you.

21 MS. JONES: Excuse me, Mr. Gilbreth.

22 Your Honor, this motion was made some months previous
23 and I believe decided by your Honor.

24 THE COURT: I remember a discussion but I don't
25 know if it was presented to the point that I decided it.

1 bmhh 6

2 MR. GILBRETH: It did, your Honor. It was
3 briefed. But it was on a different set of facts and
4 before we knew that this man would come in and say he
5 swindled these jewels.

6 THE COURT: A different set of facts or an un-
7 certain set of facts.

8 MR. GILBRETH: Both really but my point, your Honor
9 coming back to this, based upon what the Assistant United
10 States Attorney has said I move to strike all evidence
11 of events that transpired prior to April 16th. There
12 is at least partial agreement with my theory under the
13 government --

14 THE COURT: Wait. I think Ms. Jones was accepting
15 a fallback motion in saying that she finds that under
16 Briola and under the definition of the statute there isn't
17 any question that even if your characterization of the
18 facts is entirely correct, and I don't believe there is much
19 dispute about the facts, there is nevertheless an extension
20 of credit within the meaning of the act but if I don't
21 accept that view then she argues that at least as of
22 April 16th there was an extension of credit within the normal
23 understanding of that word.

24 MR. GILBRETH: Let me not seek to hoist the
25 government on any guitar. My argument is that if the

1 bmhh 7

2 court agrees with my theory that at least in the first
3 instance if not in its entirety this was an effort by
4 these three defendants to obtain the return of jewelry
5 that had been stolen by Napoli from Mr. Jacobs and then
6 I would move to strike evidence as against my clients
7 certainly that has been admitted on some theory of conspiracy
8 when it, on that kind of record, is clear that there was no
9 conspiracy to use extortionate means to collect an extension
10 of credit.

11 THE COURT: I think you are making things up, Mr.
12 Gilbreth. The question for me to decide on this motion
13 which is not a motion to acquit is, but a motion to dismiss
14 the indictment, is not whether there was conspiracy or
15 not whether the effort was to get the jewelry back rather
16 than to get money but whether there was an extension of
17 credit.

18 MR. GILBRETH: I agree.

19 THE COURT: I think you are probably right that
20 if I buy your theory that facts prior to some date may be
21 excluded but I have to decide whether to buy your theory.
22 If I have already decided the matter it will be hard to
23 find that out. I remember reviewing it with you and having
24 informally in the past hearing the argument.

25 MR. GILBRETH: You formally addressed a related

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2 issue, your Honor.

3 THE COURT: I want it to relate to the same. Refer
4 us to the date.

5 MS. JONES: June 7, 1977.

6 THE COURT: I will reserve decision until I
7 review my previous notes.

8 MS. JONES: That was my fallback position and
9 I would like to remind your Honor at this time that of
10 course Mr. Napoli testified that as early as the beginning
11 of 1976 Mr. Jacobs told him he wanted his money back, that
12 he would be hearing--

13 THE COURT: I don't blame him, do you.

14 MS. JONES: I don't but if we are going to start
15 discussing at which point Mr. Jacobs acknowledge there
16 was a debt and so does Mr. Napoli I believe it goes back
17 as early as the end of February.

18 MR. DAVIS: If your Honor please, I don't have
19 to review the testimony but I say there was no extension
20 of credit. What he did was no different than was done
21 elsewhere and crimes committed elsewhere and warrants out
22 for his arrest and the marshals should have indicted
23 him in California.

24 THE COURT: Mr. Jones takes the position that
25 the statute says that you can't use threats to get any

1 bmhh9

2 property back from anybody no matter how they got that
3 property and that's what I am going to check out. I think
4 I have ruled on it already but if I have not I will.

5 MR. DAVIS: As far as my client is concerned,
6 your Honor, just barely there is no testimony that he
7 used any threat to get anything back. The only testimony
8 of threats is that he said, "Don't use my name."

9 THE COURT: That I think is going to be a very
10 strong argument on your part before the jury.

11 MR. DAVIS: I am thinking about the motion for
12 the judgment of acquittal.

13 THE COURT: That is denied.

14 MR. WALLACH: I have a different motion, your Honor.
15 The first count is framed not under the general conspiracy
16 statute but Section 894. Section 894 talks and may I read
17 the five or four lines that I have in mind?

18 THE COURT: Yes.

19 MR. WALLACH: "Whoever knowingly participates
20 in any way or conspires to do so" then it speaks about
21 the methods. Your Honor, that speaks conjunctively and it
22 does not say they can be indicted for both or that the
23 jury can get both counts. I request your Honor to direct
24 the government to elect which counts will go to the jury in
25 the event a Rule 29 motion is denied.

* * *

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2 This court is about to charge the jurv.
3 All spectators wishing to leave may do so now. Those
4 electing to stay must remain seated until its comple-
5 tion.

6 Will the marshal please lock the door.

7 CHARGE OF THE COURT

8 (Lasker, J.)

9 THE COURT: Ladies and gentlemen, before
10 I commence my charge to you, first I want to know if you
11 can all hear me. Can you?

12 Second, there are a couple of comments
13 that I want to make in passing about statements made
14 this morning in the heat of passion, a couple of items
15 came up that I think perhaps deserve being put in
16 focus.

17 Mr. Davis and Miss Jones differ considerably
18 as to what to make of the exhibit from the Holiday Inn
19 down in Florida and whether the last page is missing
20 or not and, if so, whether that is significant.

21 That's entirely up to you, ladies and
22 gentlemen. Whatever they had to say in comment about
23 it is not evidence, as I told you that nothing else which
24 they or I or anybody else has to say about the fact is
25 evidence.

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Moreover, I think Miss Jones made a reference to thugs in her final statement which I think is perhaps unsupported by the evidence, but that again is a question for you to decide and I'll leave it at that.

Now, ladies and gentlemen, I wish that I could deliver my charge to you simply talking extemporaneously as I am at the present time. I am more comfortable that way and I think it is a more effective method of doing it than reading a charge is, but the stakes are high in cases of this kind on both sides and the law has certain complications, and in order to be sure that judges say precisely what they want to say to the juries it's become fairly customary in this court for the judges of this court, at least, and I think many others, to read their charges.

I tell you that for two reasons. First of all, I want you to understand why I will be reading to you and, secondly, I think there is a tendency on the part of all of us, and I know there is on my part, sometimes to read more quickly than I might speak otherwise. I will do my best to avoid that but if for any reason I read too fast or I speak indistinctly please raise your hands and let me know because I want to be sure that you understand everything I have to say.

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2 Moreover, while I don't want to introduce
3 personal notes more than necessary, I think you may
4 remember my having said that I had some oral surgery
5 done a week or two ago and that makes it a little more
6 difficult for me to articulate my words, so that might
7 be another reason why you couldn't understand and if
8 you don't, don't be embarrassed, tell me.

9 Ladies and gentlemen of the jury, now
10 that you have heard the testimony and the arguments
11 of counsel, the time has come to instruct you as to
12 the law governing the case.

13 You have been chosen and sworn as jurors
14 in this matter to try the issues presented by the
15 allegations of the indictment and on your determina-
16 tion of the facts -- and I stress the words "your
17 determination" -- to decide under the law as I shall
18 instruct you whether the government has or has not
19 proven either of the charges of the indictment against
20 Mr. Bufalino or Mr. Sparber or Mr. Jacobs beyond a
21 reasonable doubt.

22 I will discuss those charges with you in
23 detail in a moment. Before that, I want to give you
24 a few preliminary and general instructions.

25 First, you are to perform your duties as

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jurors without bias or prejudice to or for anybody, whether the government or any of the defendants. The law does not permit jurors, and I will not permit jurors, to be governed either by sympathy or swayed by prejudice or public opinion.

Second, we start with the proposition that we started with at the outset of the trial, that is, that the law presumes every one of these gentlemen to be innocent against both charges made against him.

You will recall that when you were selected I specifically asked each one of you if you could enter into the discharge of your duties presuming each defendant to be innocent of each charge until or unless proven guilty beyond a reasonable doubt after your own deliberations, and each of you gave me the answer "yes."

That presumption of innocence is sufficient to acquit any defendant unless and until you as jurors are unanimously satisfied beyond a reasonable doubt of that defendant's guilt on the particular charge from all of the evidence that has been presented.

At the outset of the case I told you the defendants have no obligation to put any witnesses before

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2 you because they are presumed innocent. The defend-
3 ants did not testify in this case. That was their
4 right, and you may not draw any inference against them
5 because they did not testify.

6 Since the defend- nts are not required to
7 prove anything or to put witnesses before you, they may
8 rely on cross examination by defense counsel of the
9 government's witnesses. Such cross examination
10 may raise a reasonable doubt and if you find that it
11 does, then of course you would be obliged to acquit
12 that defendant on that charge.

13 The burden or responsibility is on the
14 government to prove a defendant guilty beyond a reason-
15 able doubt and I will advise you later in the charge
16 what the elements of those offenses are.

17 Third, I want to remind you of what I re-
18 minded you at the outset of the trial, that is, that
19 the existence of an indictment does not constitute evi-
20 dence against any of the defendants but is merely a
21 method of bringing a charge against him.

22 The indictment in this case contains two
23 counts, as you know. Each count contains a separate
24 offense, and each of the charges must be considered
25 separately against each defendant.

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Excerpts from Transcript of Trial

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2 Now, I have said and counsel have said many
3 times throughout the case, and certainly in their sum-
4 mations, that the government has assumed the burden
5 of proving the defendants guilty beyond a reasonable
6 doubt. Let me define that important term for you
7 at the outset.

8 A reasonable doubt is not a vague, specula-
9 tive or imaginative doubt. It is a doubt which, as
10 the phrase suggests, is based upon reason which comes
11 either from the evidence that you have seen and heard
12 or from the lack of evidence that you feel you have
13 not seen or heard. It is a doubt which a reasonable
14 man or woman would entertain. It is a doubt -- and
15 I think this is the best definition -- which would cause
16 reasonable men and women like yourselves to hesitate
17 to act in connection with matters of importance in your
18 own private lives.

19 Let's say you have an important decision
20 to make. How do you go about making that decision?
21 You think about everything you know about it and you
22 think about everything you would want to know and have
23 not been told and you say to yourselves: "Do I have
24 enough information? Do I have enough dependable in-
25 formation so I am ready to act?" If you say, "I don't

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2 have enough," then you have a reasonable doubt. If
3 you say, "I do," then you may proceed.

4 A mere suspicion cannot justify conviction.
5 Suspicion is no substitute for evidence, nor is it suffi-
6 cient to convict if you find that the circumstances
7 merely render the guilt of the particular defendant
8 probable. The law does not deal in probabilities.

9 In saying, however, that the government
10 must prove a defendant guilty beyond a reasonable doubt
11 if there is to be a conviction, I do not mean to say
12 that the government is required to prove guilt
13 beyond all possible doubt. Indeed, in human affairs
14 it is hard to think of anything we can prove beyond
15 all possible doubt with the exception of mathematical
16 propositions, and the issues in this case are not
17 mathematical propositions.

18 The proof must be, however, of such a con-
19 vincing character that you would be willing to rely
20 and act on it in the most important decisions of your
21 own affairs.

22 The evidence in this case, as you have been
23 told on several occasions, consists of the testimony
24 of the witnesses, the exhibits which have been received
25 in evidence, the facts which have been stipulated or

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agreed by counsel. You have to decide the case based solely on the evidence, but in your consideration of the evidence you are not limited to what I may call the bald statements of the witnesses. By using the word "bald," I do not mean to suggest anything about the character of the testimony but I mean that you are entitled to and you are obliged to think behind the mere words that were uttered. Indeed, ladies and gentlemen, in this case, as in many, there is no doubt that the outcome of the case depends substantially on your determination of what witnesses you believe and the extent to which you believe them.

In deciding the many questions before you, it is your job to determine the credibility or believability of the witnesses who have testified here.

How do you go about that? Perhaps the best answer is to say that you determine the truthfulness or accuracy or weight to be given to a witness' testimony in the same way that you determine questions in your own personal lives.

We are all constantly called upon from day to day to determine how much confidence we place in the statements that people make to us. The truthfulness or dependability of a witness, as that of any other

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2 person, can be determined by his demeanor or look, his
3 or her relationship to the case and to the parties,
4 the possibility of his or her being biased or partial,
5 or of his or her not being biased or partial, the
6 stake which he or she may have in the outcome of the
7 case, the reasonableness or unreasonableness of the
8 statements made, the strength or weakness of the
9 recollection of the witness and the extent to which
10 what the witness has said has either been corroborated
11 or contradicted by the defendant or other witnesses
12 or other evidence.

13 Of course, a witness' testimony may be im-
14 peached by his own prior inconsistent statements unless
15 there is some explanation for the inconsistency. In
16 ordinary life when you need to determine the truthful-
17 ness of a person you ask yourself, don't you, as you
18 do here: Did he impress me -- or she? Did his or her version
19 seem straightforward and candid or not? Did he or
20 she seem to be trying to hide some facts? Did he
21 or she have any motive to testify falsely or have no
22 such motive?

23 The ultimate question for you to determine
24 and for you to decide on in passing on the credibility
25 of a witness is whether you believe that he or she told

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the truth. It is for you jurors, and you alone, to determine that question and in making these suggestions I have given you only guidance and I am not attempting to decide the question for you.

If you find that any witness has wilfully testified falsely as to any material -- that is, significant or important -- matter, you may reject the entire testimony of that witness or you may accept such portion of it as you believe and reject the rest.

Now, Jack Napoli has testified and there is no dispute about it, that the government has made payments to him and on behalf of himself and his family and assisted him in other ways. You are entitled to consider these facts in determining the weight you attribute to his testimony. By making that remark, however, I am not suggesting, any more than I did with the other guidelines I just gave you, that a witness who receives benefits from the government cannot testify truthfully but only pointing out to you that you may consider such facts in deciding what weight to give to a witness' testimony.

Ladies and gentlemen, as I have said, your determination in this case must be based upon the evidence.

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2 There are two types of evidence which we
3 normally speak of and I am sure you have heard them
4 referred to often. One is called direct evidence.
5 That is the evidence of an eye or ear witness. "I have
6 heard it," such a witness would say, or "I have seen
7 it." The other is indirect and is generally called
8 circumstantial evidence. Circumstantial evidence
9 is defined as the proof of a chain of events or
10 circumstances which point to the existence or nonexist-
11 ence of facts as to which there was no eye or ear
12 witness. The law makes no distinction as to the im-
13 portance or weight of such circumstantial as opposed
14 to direct evidence. It requires only that you, the
15 jury, find the facts in accordance with all the evidence
16 in the case, both direct and circumstantial, beyond
17 a reasonable doubt.

18 Now, ladies and gentlemen, both the United
19 States attorney and the attorneys for the defendants
20 have from time to time throughout the course of the trial
21 objected to introduction of evidence and addressed
22 arguments to the bench. It is the duty of the attor-
23 neys on both sides to make such objections when any
24 of them believes that the other side is proposing to
25 put into evidence or ask questions about something

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that is not properly admissible. I want you to understand that when I have sustained an objection to a question or overruled an objection, that does not indicate any attitude of mine as to how the case should be decided. What it does mean, and the only thing it means, is that if I have sustained an objection or told you to disregard information, you are to disregard the question or the answer, as the case may be, and where I have ruled against a question you are not to try and please do not try and figure out what a witness might have answered if he had been allowed to do so. That would be the sheerest speculation and it would be unjust to everybody involved.

I remind you again also of what I think counsel on both sides have asked me to tell you before. That is, it isn't the question that counts but the answers which are the evidence.

Now, ladies and gentlemen, that I have instructed you as to the manner in which you should consider the evidence, and since you have heard long summaries of the respective contentions of counsel, I will turn to the substance of the charges against the defendants.

The indictment in this case contains two

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2 counts. Each count, as I have said, charges a
3 separate crime, and of course each defendant's case must
4 be considered separately and must stand or fall on
5 the basis of the evidence against him and not someone
6 else.

7 Count 1 charges all the defendants with
8 conspiring to violate Section 894 of Title 18 of the
9 United States Code. The part of that law, which
10 is a law passed by Congress, with which we are concerned
11 reads, and I will now quote the law:

12 "Whoever knowingly participates in
13 any way or conspires to do so in the use of any
14 extortionate means (1) to collect or attempt to
15 collect any extension of credit or (2) to
16 punish any person for the nonrepayment thereof
17 shall commit a crime."

18 Count 2 of the indictment charges all of
19 the defendants with actually committing a violation
20 of the law which I have just read.

21 Let me discuss with you now count 1.

22 Count 1 charges the three defendants with
23 conspiring to violate Section 894, and in particular
24 by conspiring wilfully and knowingly to use extortionate
25 means involving the use of implicit or explicit threats

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2 of the use of violence to cause harm to the person or
3 property of Jack Napoli in order to collect and attempt
4 to collect from Jack Napoli extensions of credit made
5 by Herbert Jacobs and to punish Jack Napoli for the
6 nonrepayment of said extensions of credit.

7 Before I describe to you the elements of
8 the offense of conspiring to violate Section 894, let
9 me define the term "extension of credit" as used in
10 the law.

11 An extension of credit means the making
12 or renewing of a loan or the entering into an
13 agreement, tacit or express, by which payment of any
14 debt or claim, however arising, is deferred, that is,
15 put off or delayed.

16 Now, as you know, the defendants are
17 charged with using extortionate means to collect the
18 debt or extension of credit alleged from Mr. Jacobs
19 to Mr. Napoli. The fact that the debt or extension
20 of credit in this case came about because Jack Napoli
21 received jewelry from Mr. Jacobs without paying for
22 it does not prevent your finding an extension of credit.

23 By giving you this instruction, I do not
24 mean to tell you that you must find that there was
25 an extension of credit from Jacobs to Napoli. That is

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2 for you to decide. But I do wish you to understand
3 that the mere fact that the property here taken was taken
4 without paying for it does not prevent it from being an
5 extension of credit within the meaning of the law, just
6 as much as an ordinary loan would be an extension of credit
7 within the law.

8 Let me now define the term "conspiracy" for
9 you. A conspiracy is an agreement between two or more
10 people to violate the law.

11 Ladies and gentlemen, I am concerned very
12 often that our charges to you -- that is, the judge's
13 charge to you -- are too complicated and that we overdo
14 them. If you remember nothing other about the charges
15 that I am giving you, be sure that you certainly do
16 remember what I have just told you about what a conspiracy
17 is. A conspiracy is nothing more or less than an
18 agreement between two or more people to violate the
19 law.

20 In this case, the government contends
21 that the purpose of the conspiracy was to use extortion-
22 ate means to collect an extension of credit. Before
23 you may find any of the defendants guilty under the
24 conspiracy charge, you must find that the government has
25 proven beyond a reasonable doubt both of the two follow-

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2 ing elements:

3 First, you must find the existence of the
4 conspiracy charged. Obviously, you cannot find a
5 defendant guilty of conspiring unless you do find that
6 the conspiracy which is charged actually existed, that
7 is, that there was an extension of credit, and that the
8 defendants conspired to use extortionate means to
9 collect that extension of credit.

10 Second, you must find that the defendant
11 whose case you are considering at that time -- be-
12 cause you will be considering these cases separately --
13 knowingly and wilfully joined in that conspiracy.

14 Let's talk first about the first element,
15 the existence of the conspiracy.

16 As I have told you, conspiracy is an agree-
17 ment of two or more people to violate the law. The
18 gist of the crime is the unlawful agreement to do so.
19 It doesn't matter whether the defendants ever accomplished
20 what they wanted by the plan, although the government
21 claims here that the defendants alleged plan did succeed.
22 A conspiracy need not be successful in order to
23 constitute an illegal act or offense. It is the very
24 agreement itself to violate the law which constitutes
25 in this case the crime.

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2 Now, it has been said by counsel on both
3 sides that to establish a conspiracy the government is
4 not required to show, or would not be expected to show,
5 that two or more people sat around a table and entered
6 into a solemn pact to violate the law. You may find
7 that the existence of the conspiracy has been established
8 if from the proof of all the relevant facts and cir-
9 cumstances you find, beyond a reasonable doubt, of course,
10 that at least two of the alleged co-conspirators came to
11 a common agreement to carry out the criminal acts charged
12 in the indictment.

13 Express language or particular words are
14 not required to indicate an assent or an attachment or
15 agreement to a conspiracy. When people in fact
16 decide to enter into a criminal conspiracy, much is
17 often left, as you can understand, to the unexpressed
18 understanding. You must first determine, therefore,
19 whether or not the proof establishes that the conspiracy
20 charged in the indictment actually came into exist-
21 ence.

22 It is not necessary, however, that you find
23 that all of the co-conspirators alleged in the in-
24 dictment joined in the conspiracy, but obviously you must
25 find that at least two people did or you can't have a

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2 conspiracy.

3 In deciding this first element, you should
4 consider all of the evidence which has been submitted
5 with respect to conduct, acts and declarations of
6 each alleged conspirator, and you may make such infer-
7 ence as may be reasonably drawn therefrom as to each
8 of the defendants.

9 If, upon consideration of the evidence, you
10 find beyond a reasonable doubt that the minds of at
11 least two of the alleged co-conspirators met in an
12 understanding to violate the law, then the proof of the
13 existence of the conspiracy is complete.
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2 If you conclude that the conspiracy charged
3 in the indictment did exist, you must next determine
4 whether the defendant whose case you are then considering
5 participated in the conspiracy with knowledge of its
6 unlawful purpose and in furtherance of its unlawful ob-
7 jectives.

8 Mere knowledge by a defendant of the exist-
9 ence of a conspiracy or of the illegal acts on the part
10 of other alleged co-conspirators, or mere association
11 with them, is not sufficient in itself to establish
12 a defendant's membership in a conspiracy.

13 To determine membership you must find beyond
14 a reasonable doubt that the defendant in question
15 joined the conspiracy knowingly and participated in it
16 intentionally, that he was aware of the purposes and
17 objectives of the conspiracy and entered into it with
18 the specific intent to violate the law. This
19 determination, whether the defendant became a member
20 of the conspiracy, must be based on the evidence
21 as to that defendant alone and not as to anyone else.

22 To have the requisite knowledge the de-
23 fendant need not have known the full extent of the
24 conspiracy and all of its activities. Every member
25 of the conspiracy or, rather, each member of the

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2 conspiracy may perform separate and distinct acts at
3 different times and at different places. Some con-
4 spirators may play a major role in the conspiracy and
5 others a minor role.

6 The guilt of the conspirator is not governed
7 by whether he played a great or small role in the con-
8 spiracy. A conspirator may join a conspiracy at
9 any point in the conspiracy and be held responsible
10 for all that had been done before he joined and all
11 that was reasonably done by conspirators in pursuance
12 of the conspiracy afterwards and while he remained a
13 member. The question is one of intent and that is
14 one of the major facts for you to decide. It concerns
15 what was in the particular defendants mind and the
16 purposes for motivating his course of conduct.

17 Of course, medical science has not yet devised
18 an instrument to record wilfulness or intention. Those
19 are mental processes. Often direct proof of them is
20 not available. Accordingly, intent may be legally
21 determined from the acts and conduct of a person and the
22 circumstances surrounding those acts and conduct
23 and such reasonable inferences as may be drawn from the
24 facts.

25 In connection with the charges in this in-

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2 dictment, it is not necessary for the government to prove
3 that the defendant in question actually intends to cause
4 physical injury to Jack Napoli but only, as I believe
5 I have instructed you, that the defendants intended to
6 threaten Jack Napoli with harm to his person or property
7 and that the words or action of the defendant in ques-
8 tion in fact constituted express or implied threat.
9 However, it is the government's obligation to prove
10 beyond a reasonable doubt that the particular defend-
11 ant whose case you are considering acted wilfully
12 or knowingly.

13 An act is done knowingly if it is done
14 voluntarily and on purpose and not because of a mistake
15 or an accident or a negligent or some other innocent
16 reason.

17 An act is done wilfully if it is done know-
18 ingly and deliberately. Wilful does not mean a defend-
19 ant in addition to knowing what he was doing must also
20 have known or supposed that was breaking the law.

21 While the indictment charges in count 1
22 that the conspiracy began and ended on or about certain
23 dates, it is not essential that the government prove that
24 the conspiracy started and ended on or about those dates.
25 It is enough if you find that in fact a conspiracy was

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2 formed and that it existed for a substantial period of
3 time within the time frame alleged in the indictment,
4 which I think runs from February of 1976 to the date
5 of the indictment, which is in October of 1976.

6 I come now, ladies and gentlemen, to discuss
7 count 2 of the indictment. That count charges the de-
8 fendants with violating Title 18, Section 894. That
9 statute provides in pertinent part as follows:

10 "Whoever knowingly participates in any
11 way with the use of any extortionate means to
12 collect or attempt to collect any extension of
13 credit or to punish any person for the nonrepay-
14 ment thereof shall commit a crime."

15 I need not remind you again of the definitions
16 of the terms involved.

17 In order to convict any of the defendants
18 of the crime charged in count 2 you must find beyond
19 a reasonable doubt as to that defendant all three of the
20 following elements:

21 1. That on or about the dates stated in
22 count 2 a debt was owing to the defendant Herbert
23 Jacobs by Jack Napoli.

24 2. That on or about the dates stated in
25 count 2 the defendant whose case you are considering

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2 made an attempt to collect the debt owed to Herbert
3 Jacobs. That is, that on or about those dates that
4 defendant attempted to induce Jack Napoli to pay his
5 debt to Herbert Jacobs.

6 3. In so attempting to collect the
7 debt, that the defendant, acting unlawfully, wilfully
8 and knowingly, in any way participated in the use of an
9 extortionate means of collection.

10 I think I have told you but if I haven't I
11 will state now, the statute defines an extortionate
12 means as any means which involves an express or
13 implicit threat of use of violence or other criminal means
14 to cause harm to the person or property of any person.
15 Violence means simply physical harm of any kind.

16 In deciding whether a defendant wilfully
17 made implied threats of physical harm or other criminal
18 means to Jack Napoli, you should take into consideration
19 all of the evidence in the case bearing on what a
20 particular defendant intended by his statements and
21 what he actually said to the victim or what he knew that
22 other people had said.

23 Words, harmless of themselves, may take on
24 a threatening meaning in the context in which they are
25 used. On the other hand, you may decide that the

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2 words used by defendant in the full context of what
3 was said carried no such threatening significance.
4 The question for you to decide is whether the defendant
5 whose case you are considering intended by his words
6 or actions to give the impression that physical
7 harm or other criminal means would be used against
8 Jack Napoli if he refused to pay. If so, what in the
9 full context of the conversation or of all of the
10 evidence that you have heard the words actually used by
11 the defendant reasonably appear to you to have stated
12 such threats explicitly or by implication.

13 As I told you with regard to count 1, it is
14 also true as to count 2 that in order to convict you need
15 not find that the defendant actually intended to cause
16 physical injury to Jack Napoli. You need only find
17 that the defendant intended to threaten Jack Napoli
18 with harm to his person and the words or acts con-
19 stituted an expressed or implied threat.

20 It is not necessary that the government
21 prove that Jack Napoli was actually placed in fear
22 by the defendants. Actual fear of harm is not an
23 element which the government must prove in this case.
24 To prevail, the government need only show that the
25 defendant intended to make a threat of use of violence
 or other criminal means to cause harm to Jack Napoli.

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2 Ladies and gentlemen, there is another basis
3 upon which you may find a defendant guilty under Count 2
4 even though he did not literally commit the act himself.
5 Under the law, any person who commits an act in violation
6 of a criminal statute, that is a law passed by Congress,
7 of course commits a crime. It is also a crime to aid or
8 abet someone else to commit a crime. Accordingly, if you
9 should find beyond a reasonable doubt that any of the defendants
10 named in Count 2 committed the crime charged and that another
11 defendant aided or abetted that first defendant you would
12 have a sufficient basis for finding the guilt of the second
13 defendant as to Count 2.

14 To find that a defendant aided or abetted
15 someone else to commit a crime, you must find in some positive,
16 clear way that that defendant associated himself with the
17 crime, that he participated in it not just casually but is is
18 something he really wished to bring about. You must find that
19 he thought by his actions or desired and intended by his
20 actions to make the venture charged succeed. Thus, in order
21 to find the defendant guilty of aiding or abetting someone else
22 you must of course find something much more than a mere knowledge
23 on his part that a crime was being committed for a mere specta-
24 tor at a crime is not a participant however unfortunate his
25 conduct would be. If you stood watching somebody else

A 153
Excerpts from Transcript of Trial

1 nssh 2 1007
2 hold up another person with a gund, you cannot by that action
3 or in action alone be found to aid or abet the assailant.

4 The government is not required to prove the
5 essential elements of the offense as defined in these
6 instructions by a particular number of witnesses. The
7 testimony of a single witness or more may be sufficient
8 to convince you beyond a reasonable doubt of the existence
9 of an essential element of the offense charged if you
10 believe beyond a reasonable doubt that the single or
11 more than single witnesses are telling the truth.

12 I think by now it is undisputed but I
13 instruct you that the oral interceptions, that is the taped
14 conversations admitted into evidence, were lawful and
15 proper oral interceptions since Jack Napoli a party to the
16 conversations consented to having his oral conversations
17 recorded and under the law such oral interceptions are legal.

18 I have come nearly to the end of my
19 instructions. In a sense the most important part is what
20 I am about to say. That is with regard to your role as
21 jurors. It is for you and you alone to decide whether any
22 of the defendants is guilty of either of the charges against
23 him.

24 I know you will try these issues in accordance
25

1 nshh 3

2 with the serious oath that you took as jurors when you
3 promised that you would well and truly try the issues
4 joined in this case and as you may remember, based solely
5 on the evidence which you have before you in this trial
6 and the instructions as to the law that I have now given
7 You, render a true and just verdict. I like that phrase
8 "well and truly try the issues joined in this case." It
9 goes back a thousand years or so, ladies and gentlemen.
10 Its old fashioned flavor should mean something to you and
11 remind you of the hundreds of thousands of juries who have
12 performed this function before you and you must a true
13 verdict render based upon the evidence and only the evidence
14 that you have heard in this court. In order for you to reach
15 a verdict of guilty or not guilty on either count as to
16 any defendant your verdict must of course be unanimous.
17 That is, everybody must agree on that particular verdict.
18 In spite of the requirement of unanimity each of you must
19 decide each count as to each of the defendants individually
20 and in accordance with your own conscience but only after
21 deliberation with your fellow jurors to determine whether
22 you believe a just verdict is being reached. You should not
23 hesitate to change your minds if you became convinced
24 that your original view of the case does not accord with
25 the facts or the law. On the other hand you should not

1 nshh 4

2 change your view just for the matter of reaching a
3 verdict for a matter of **convenience**. I have no reason to
4 believe that you will not be able to reach a unanimous
5 verdict one way or another as to the matters put before
6 you. Ladies and gentlemen, you have the right to have
7 any of the evidence sent in to you, any of the exhibits,
8 that is, to have any of the testimony read back to you and
9 to have any of the tapes played to you.

10 It is customary in our court for the juror who
11 sits in the number 1 seat to act as the foreman or forelady
12 of the jury. I will ask Ms. Henry to do that in this case.
13 That doesn't mean she will have any particular authority
14 that any of the rest of you don't have but she will merely
15 preside at your discussions and send any communications
16 which the jury has through the marshal who will be standing
17 outside your door to the court. If you do wish to ask for
18 any exhibits it will be helpful if you will explain as clearly
19 as possible what exhibits you want so we can locate any
20 exhibits you want. If you do wish to have the testimony
21 of a witness read back it will be helpful to explain not
22 only who it was but a particular subject if there is one,
23 that you are interested in so we can locate that testimony
24 and have it read to you as quickly as possible.

25 Ladies and gentlemen, I have prepared and I will ask

1 nshh 5

2 the clerk to now go into the robing room for me to get from
3 the desk because I seem to have ~~left~~ it there, a verdict
4 list. That verdict list consists of the names of each
5 of the defendants together with a reference to each of the
6 two counts and with a blank indicating not guilty or guilty
7 as the case may be. I will give a copy of that or ask
8 the clerk to give a copy of that to Ms. Henry right now.
9 When the jury reaches its verdict you can put an X mark in
10 the appropriate space, Ms. Henry. I have now come to the
11 very end of my instructions. I wish to meet briefly with
12 counsel in the robing room to see whether they think
13 my instructions need any clarification for you. Please
14 wait in the jury box and we will be back very soon.

15 (Robing room)

16 MR. GILBRETH: Your Honor, I do have two requests
17 with respect to your charge and one request as to another
18 matter. First, your Honor, again, I renew my objection
19 to your charge with respect to an extension of credit.
20 It is a difficult thing to define. The words in the statute
21 as I read them, your Honor, is that there is an extension
22 of credit within the meaning of the statute only if there
23 is either a loan or an extension of a loan or second, there
24 is some form of agreement whereby a debt or some other
25 transaction is extended. As I took notes, your Honor, you

1 nshh 6

2 seem to be saying, at least at one point, that it was
3 an extension of credit if there was a debt. I think
4 that is incorrect, your Honor. I know you focused on it
5 and you treated it in other aspects of your charge.

6 THE COURT: I don't think I said there is an
7 extension of credit if there was a debt alone.

8 MS. JONES: I didn't hear that. I think your
9 Honor read the definition from the statute.

10 THE COURT: I read the definition and the only
11 thing extraordinary about this case where there is clear
12 disagreement among counsel and I have decided in favor
13 of the government is that the mere fact that the alleged
14 extension of credit arose in the circumstances which
15 everybody agrees that it did arise in here does not prevent
16 it from being an extension of credit within the meaning
17 of the statute. I believe that is the law. If it is not
18 there will be acquittals here or rather reversals on appeal
19 if there is a conviction. We have discussed that at some
20 great length.

21 MR. GILBRETH: I will pass to the second point
22 and that is to renew my request for an uncalled witness
23 charge. I think there are two bases for that uncalled witness
24 charge. One basis is that the government in opening said
25 that there would be agent witnesses to testify to surveillance

1 nshh 7

2 identification. There was an agent who testified to
3 voice identification of Bufalino and surveillance. There
4 was not an agent to testify with respect to voice identifica-
5 tion of Sparber and Jacobs.

6 Second, your Honor, I believe that it is fair
7 to say that Mr. Ginsberg has been retained by the government
8 on a per diem basis. He testified as the government's expert
9 during the suppression hearings. He has been in court every
10 day. I think that he is within the usual language of the
11 uncalled witness charge that has been endorsed by the
12 Court of Appeals and that is if it is within the power of the
13 government to produce a witness and so forth. He doesn't
14 contend you have to do this, your Honor--

15 THE COURT: It is clearly within the government's
16 power to call him. I don't think even the jury could question
17 that he has been sitting in the courtroom all the time.
18 I understand the reasons that compel you to make the request.
19 I disagree it is appropriate to emphasize those points. I
20 think you articulated the argument, a very sensible argument
21 before the jury and I will let it stay at that.

22 MR. GILBRETH: My last point which doesn't have
23 to do with the charge and I make this as a request is that
24 I have reread the Court's voir dire of the jurors after
25 there was some note that came from the jury with respect to

1 nshh 8

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2 glances or perhaps conduct on the part of the spectators.

3 I would request after the jury is excused that we be

4 allowed to conduct a voir dire of the alternate jurors

5 to further explore that. I don't want to talk to the alternate

6 jurors unless the Court would consent to being present.

7 If the Court won't consent I won't pursue it.

8 THE COURT: I have already examined them at
9 the time these events occurred.

10 MR. GILBRETH: You did. I think they probably
11 discussed this.

12 THE COURT: I think it is in the record that they
13 had discussed it at the time when the questioning occurred.

14 MS. JONES: Yes, it is.

15 MR. GILBRETH: The basis of my request is to
16 probe a little bit more deeply, if I may, in the Court's
17 presence of the alternate jurors. It struck me that might
18 be a compromise procedure where we don't confront the
19 jurors as counsel on this point but we do have an opportunity
20 to at least assure me --

21 THE COURT: I will consider it. Mr. Davis?

22 MR. DAVIS: I have nothing to add beyond what
23 Mr. Gilbreth has said.

24 THE COURT: Mr. Wallach?

25 MR. WALLACH: Maybe I haven't heard all the

1 nshh 9

2 evidence but your Honor did charge in the language of
3 the statute about other criminal means. I think the main
4 thing was a threat of violence. I don't know what other
5 criminal means could mean.

6 THE COURT: Do you want to comment on that, Ms.
7 Jones?

8 Mr. Wallach suggests and it is a question that
9 ought to be discussed that I used the words of the statute
10 as I did, that is that the statute condemns the use of
11 threat or other criminal means for the purpose of collecting
12 a debt and he questions whether there was another criminal
13 means.

14 MS. JONES: There is a kick and it is covered
15 by other criminal means.

16 MR. DAVIS: There is no testimony to that.

17 MS. JONES: Yes, there is.

18 THE COURT: Yes, there is.

19 MS. JONES: I don't see any reason to take
20 out other criminal means.

21 THE COURT: I am satisfied with that statement
22 and I will let it go at that.

23 MR. WALLACH: I take exception.

24 MS. JONES: I would oppose interrogating the
25 alternate jurors with respect to this. I read the voir dire

1 snhh 10

2 and I think it was covered. I don't see any purpose to it
3 beyond fishing around for I don't know what.

4 THE COURT: I think the defense is always required
5 find facts to support the motion that he didn't get
6 fair trial. I don't want Mr. Gilbreth, to pursue it all
7 over the world. He wants to see if they will tell us something
8 now that they didn't tell us before.

9 MR. DAVIS: I am most disturbed.

10 THE COURT: This is something we can talk about
11 after the jury has commenced deliberations.

12 (Open court)

13 THE COURT: Ladies and gentlemen, I think we have
14 told you everything we need to tell you. You are now
15 free to commence your deliberations as soon as the marshal
16 is sworn in. All right marshal please rise and come forward
17 for the oath.

18 (Marshal sworn)

19 THE COURT: Before you leave, I have the unhappy
20 duty of releasing Mr. Breswell and Mr. Napper. I can't
21 think of anything more disturbing then sitting on a
22 case for five or six days and then having been excused.
23 The law does not permit the alternates to deliberate with
24 the jurors if the jury is intact and it is. I thank
25 the alternates and counsel thanks you. I excuse you at

1 nshh 11
2 this time. If you have any belongings in the jury room
3 I ask you to go get them and then return to the courtroom
4 so the jurors can commence deliberations in the jury room.
5 Please do that. Thank you. Gentlemen, will you please
6 wait there until the jury leaves.

7 Madam marshal, you can take the jury into the
8 jury room now.

9 (Jury left the courtroom at 3:30 P.M. to
10 deliberate.)

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1 nshh 12

2 THE COURT: I would like to ask Mr. Napper and
3 Mr. Breswell to remain seated in the courtroom for a moment
4 or two. I want to confer with counsel. I may want to
5 see you in the robing room. If not, I will tell you and
6 you will be excused.

7 (Robing room)

8 THE COURT: Gentlemen, before I act on Mr.
9 Gilbreth's request, one way or another, I would like to
10 review the questioning of these two jurors in particular.

11 MR. GILBRETH: I thought you might, your Honor,
12 and I will hand you the transcript. It is first Mr. Napper
13 and then Mr. Breswell.

14 THE COURT: I will read their testimony out loud.

15 (Testimony read)

16 THE COURT: I must say, Mr. Gilbreth, that in the
17 light of the positiveness of those answers which seem to
18 be made in answer to a question reasonably clear I can't
19 see any basis for calling them in. Would you explain what
20 you have in mind?

21 MR. GILBRETH: I don't want to embarrass these
22 people or examine them strongly. It seems clear that at
23 least three of the jurors believe that one or more of the
24 spectators approached them and engaged them in conversation.
25 The forelady when she was examined by your Honor and that is

1 nshh 13

2 also in the transcript before the Court said she discussed
3 it with all of the jurors, if I remember correctly. Mr. Napper
4 in particular is a man that I think I can communicate
5 with freely and I would like to have him tell me what
6 was said by the other jurors, if anything, in his presence
7 about the spectators. My concern, my rather deep concern
8 has been that the jurors associate the spectators with
9 one more of the defendants and think that through the
10 spectators the defendants may have tried to do something
11 wrong. If there is a flavor of that, particularly without
12 any proof of that and I can discern that I will renew
13 my motion for a mistrial.

14 THE COURT: You can really renew it without I
15 think bothering Mr. Napper. I think the record and
16 the questioning will establish and Ms. Jones can state her
17 disagreement with me as to what the record says, that the
18 subject was discussed in the jury room, that at least one
19 of the jurors told either the forelady or Mrs. White or one
20 of the three persons you are referring to to tell what
21 was on their mind to the Judge. That is exactly what happened
22 through the clerk. The questioning then occurred. Either
23 explicitly or by implication it is reasonable to conclude
24 that one or more of the jurors who had something positive
25 to report did, I think, and I may be reading my own estimate

1 nsh 14

2 into it, did conclude that the spectators to whom they
3 referred were associated in some way or another with
4 one or more of the defendants. There was no indication
5 that I can think of that it was any particular defendant.

6 MS. JONES: That's correct.

7 THE COURT: Although I told you long since
8 that I happened to see the spectators in the presence
9 of Mr. Bufalino. No juror told me that they saw that or
10 concluded that. In spite of those factors every one of the
11 jurors assured me and I on the basis of my personal meeting
12 with them was persuaded it was true that none of them
13 were intimidated or that their verdict would be adversely
14 affected by what they had to report. It is also appropriate,
15 I think, to mention that since that time, of course, the
16 spectators as far as I know, have not been in court and that
17 is four or five days ago. I mention that because it seems
18 to me if their presence created any impression at that time
19 it would long since have been subsided. I believe the
20 complaint was made only on the second day of the trial.

21 MR. GILBRETH: Very early, your Honor. There
22 is one further point. You may recall, your Honor, when
23 I first raised this question and suggested even the voir
24 dire, I pointed out something that I would like to point
25 out again. It would be an easy thing to ask these two

1 nshh 15
2 gentlemen and then we would know. My fear is that
3 the jury may have had either the same experience that you
4 had or some similar experience where they saw one or
5 more of the defendants engage in casual conversation
6 with one or more of these spectators. I bring your
7 attention, your Honor, to the fact that early in the trial
8 because of some of the matters that have come up with
9 respect to the spectators and the possibility that the
10 jury may see the spectators when they file out, you requested
11 that none of us, the spectators included, leave the room
12 for five minutes. I suggest, your Honor, that if we ask
13 one of these two gentlemen they may tell us that they
14 too saw one or more of the spectators.

15 THE COURT: I will be glad to ask that objective
16 question.

17 MR. GILBRETH: My two points and I will be quiet
18 because it is late in the day and you have been patient
19 with us. If I have an opportunity to ask these two gentlemen
20 questions and I would go into two areas one specifically
21 what was said among the jurors, if anything, about these
22 spectators. What did the forelady tell them and what they
23 said in the privacy of their room and secondly, did anybody
24 say anything that would associate the spectators that are
25 being complained about with one or more of the defendants.

1 nshh 16

2 MS. JONES: I would object to asking any questions
3 of the two alternates. Whatever they noticed in an elevator
4 or whatever associations they may have noticed is totally
5 irrelevant to the deliberations of the 12 jurors who are
6 in there now. To question jurors there has to be a basis
7 to believe that you are going to learn something from them,
8 some good faith basis. You have already spoken to all the
9 jurors on this panel. Each of them has told you exactly
10 what they saw. You have instructed them. First, you asked
11 them and they said no. You instructed them that it should
12 not affect them. We have to presume they will follow your
13 instructions. I don't see any help the two alternates
14 can be to us. What happened to them is not what happened
15 to any of the 12 that are actually doing the deliberating.

16 MR. DAVIS: If your Honor please, in connection
17 with what Mr. Gilbreth said I am looking at page 238.
18 You are talking to Pablo Valenten. He answered this
19 morning in the jurors' room there was a discussion about
20 quite a few guys, jurors being followed. I suggested
21 they bring it to you. However, it appears while obviously
22 there was a general discussion in the jury room and that none
23 of the other jurors told you about it --

24 THE COURT: I have it there.

25 MR. DAVIS: None of the other jurors even mentioned it

1 nshh 17

2 I am most disturbed about what Ms. Henry said because, two or
3 three of the big guys that sit over there. At first I
4 thought they were part of the jurors. I found they wasn't
5 part of the jurors. I finally continued to talk as of
6 yesterday --

7 THE COURT: Let me interrupt at this point
8 to say that I think it would be a bad principle for the
9 court to start questioning or authorize the questioning
10 of dismissed alternate jurors unless there was a very strong
11 reason to do so and I think that the situation has been
12 objectively and adequately canvassed before this time and
13 without meaning to criticize anybody which I certainly
14 don't because you have all been very thorough in prosecution
15 or defense of the case, it seems to me that if there
16 were a serious reason to be objectively concerned, let
17 me put it that way, about the fairness of the trial, that
18 it would have been raised by counsel immediately after
19 the record become available and it certainly should have
20 been.

21 I am not going to try to rule as a technical
22 waiver or anything of that sort. I mention it because it
23 strikes me as a factor relevant to any determination as to
24 how seriously objectively viewed this episode was. I am
25 convinced and I repeat for the record in case there should be

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2 a conviction, don't misconstrue when I put it that way, and the
3 appeal, that the trier of the facts believes, and everything
4 is on the record, that no juror was intimidated or resentful
5 but simply that they were annoyed and wanted to bring their
6 annoyance to the attention of the court for the very good
7 reason of eliminating an extraneous factor.

8 I think that the situation is in hand and
9 I will ask the clerk to excuse the two alternate jurors.

(Alternates excused)

10 MR. DAVIS: The nature of the trial being what it
11 is, if this were a trial in a commercial matter it would
12 be entirely different.

13 This is the type of a case--

14 THE COURT: Mr. Davis, really. I have thought
15 about it, thought about it, personally questioned 14 jurors,
16 I have just gone through another discussion on it and I think
17 that I have given the subject adequate treatment which you
18 are quite right that it deserves, even in a criminal
19 setting and unless there is something that you haven't
20 brought to my attention before, which is hard for me to
21 believe, I would like to let the record stand.

22 MR. DAVIS: I stand on my former exceptions
23 to your Honor's prior ruling.

24 MR. GILBRETH: Thank you, your Honor.

25 (Note received from the jury at 3:50 P.M., marked

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :

v.

76 Cr. 982
(MEL)

RUSSELL A. BUFALINO, :

Defendant.

-----x

October 21, 1977
10:15 A.M.

B E F O R E :

HON. MORRIS E. LASKER,

District Judge.

A P P E A R A N C E S :

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
BARBARA JONES, ESQ.,
Assistant United States Attorney

WILFRED L. DAVIS, ESQ.,
Attorney for Defendant

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2 (Case called)

3 MS. JONES: Government ready.

4 MR. DAVID: Defendant ready.

5 THE COURT: Ms. Jones, I gather you
6 would like to make a statement.

7 MS. JONES: Yes, your Honor. I will
8 limit my comments this morning because I know you have
9 received a full probation report and also a sentencing
10 memorandum from the government.

11 In that memorandum, your Honor, without
12 specifying specific period of time for incarceration
13 the government has recommended that this Court impose
14 a sentence of substantial incarceration.

15 In doing this, your Honor, we are asking
16 this Court to recognize that Mr. Bufalino is far from
17 the ordinary defendant.

18 Since at least 1957 with the now famous
19 conference at Appalachia, Mr. Bufalino has been a major
20 figure in organized criminal activity in this country.
21 He stands convicted today of extortion and this criminal
22 conviction is consistent with the pattern of his criminal
23 activities throughout his life. These activities have
24 included loansharking, illegal gambling, transportation
25 of stolen property and labor racketeering and just as

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in this extortion case, as your Honor noted throughout the trial, I am sure, that Mr. Bufalino used other individuals in order to further his criminal activity, in this case Mr. Sparber. Throughout the past several years Russell Bufalino has utilized various individuals who were in his hire in order to further criminal activities.

Incarceration in this case is particularly appropriate not only because it will remove Russell Bufalino from the active commission of a crime but also because it will impair his ability to control and direct the criminal activities of others.

The government is not asking for a substantial sentence in this case out of any expectation that Russell Bufalino will be rehabilitated. We ask it because Russell Bufalino is a present danger to the community and because the government firmly believes that the people of the United States have a right to protection from Russell Bufalino.

Thank you.

THE COURT: Mr. Davis.

MR. DAVIS: Your Honor, I intend to be brief.

Your Honor is quite familiar with all the

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2 facts in the case and I think I made myself and my
3 position clear on the record throughout the trial.

4 I take issue with Ms. Jones' statement
5 because they are unsupported. He is not a danger to the
6 community and I believe your Honor is in receipt, and
7 I will comment about it later, of numerous letters from
8 persons in the community as to his --

9 THE COURT: I am in receipt of them and
10 I have read every one of them and I credit them, but
11 they are not inconsistent with other forms of behavior
12 too.

13 MR. DAVIS: Russell Bufalino, your Honor,
14 I have said it before, is not guilty of the charges in
15 this case. I am not going to review them.

16 THE COURT: Do you mean, Mr. Davis, that
17 he didn't do what the indictment says he did or that
18 that doesn't constitute a crime?

19 MR. DAVIS: I contend that he did not do
20 what the indictment says he did.

21 THE COURT: I can't agree with you on that.

22 MR. DAVIS: I also contend that it does
23 not constitute a crime of what is alleged.

24 THE COURT: That of course I have ruled
25 on but that is up to the Court of Appeals if you appeal.

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MR. DAVIS: I further contend, your Honor,

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in view of your Honor's comment that it was impossible

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to get a fair trial before this jury, and I made numerous

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objections and motions for a mistrial and I believe that

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Mr. Gilbreth joined me in those motions.

7

I feel that there was no way of reaching

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this jury in view of incidents that happened in your

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Honor's --

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THE COURT: Mr. Davis, I respect the

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sincerity of your views on the subject but obviously I

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wouldn't have let the case go to a conclusion if I had

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felt that Mr. Bufalino didn't receive a fair trial. So

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my sentencing will be based on my conviction -- I don't

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want to make a pun -- that it was a fair trial and I

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have no doubt of it in my own mind.

17

MR. DAVIS: If your Honor please, Mr.

18

Bufalino is married. He is a good family man. He has

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never been convicted of a crime before.

20

THE COURT: That is not quite accurate.

21

He was convicted but the conviction was reversed.

22

MR. DAVIS: That is not a conviction,

23

your Honor.

24

THE COURT: All right.

25

MR. DAVIS: There is much in the presentence

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2 report about that and I, of course, take issue with it
3 because there was no conviction.

4 The report will also state that he is an
5 old, compassionate, generous person who lives modestly.
6 He is to be seventy-four years old next week. He has
7 been continuously employed since a young child, his
8 mother having been widowed at a very, very early age
9 and he was an orphan for part of that time and I believe
10 he went to work as a mechanic sometime in 1916 when he
11 was about eleven years old.

12 He is practically blind in one eye and he
13 is a diabetic even though it's controlled.

14 THE COURT: I am aware of it.

15 MR. DAVIS: The statements, your Honor,
16 by the FBI and the probation report, I feel are unfair,
17 untrue and unsupported. Those statements of past
18 criminal activity, again by the FBI, are not based upon
19 any convictions. They may have been illegally obtained,
20 if they are based upon anything at all.

21 In this report, and I must point out, that
22 in his local community, the report on page 5 says, talking
23 about criminal activity "That the local and state law
24 enforcement officials indicate that they have had no
25 problems with Russell Bufalino."

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2 THE COURT: Reading about Mr. Bufalino
3 reminds me of the column in the newspaper.-- Which news-
4 paper do you read? If you read that news report you
5 are talking about you get one impression and if you read
6 the crime commission report you get a different impression.

7 MR. DAVIS: Fortunately the reports are
8 there but they are not supported. They are only pure
9 conjecture.

10 There are numerous character letters from
11 the people as I said earlier who have lived and worked
12 and are with him. These are people from all walks of
13 life who know the man. They attest to his good
14 character and the person he really is.

15 I ask your Honor to give these letters the
16 weight that I feel that they deserve.

17 If your Honor please, I have heard your
18 Honor's comments and it's unfortunate but I don't think
19 he is a threat to society. I don't think he has done
20 any harm.

21 I ask your Honor because of his age, because
22 of his condition, because of the good he has done in
23 the community, to place him on probation, as strict as
24 you want to make it, where he is under the supervision
25 of our very competent Probation Department and in that

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2 connection let me say that he, in my opinion, cooperated
3 with them fully and tried to give them all the information
4 they sought.

5 I ask your Honor to place him on probation
6 and I assure your Honor that he will be no threat to
7 society and, as I said, the Probation Department could
8 have constant supervision over his activities.

9 Thank you.

10 THE COURT: Mr. Bufalino, you heard me
11 say to Mr. Sparber that the defendant has the right at
12 this time to say anything they wish to the Court with
13 regard to their own case and I would be very glad to
14 hear from you. You have sat before me for several
15 weeks during the course of this case and now by the cir-
16 cumstances of our lives we have a relationship whether
17 we want it or not.

18 Is there anything you want to tell me?

19 THE DEFENDANT: Yes, sir, your Honor.
20 I think Mr. Davis said it all. I am innocent.

21 THE COURT: Mr. Bufalino, I respect the
22 sincerity of your view and I am sorry to have to disagree,
23 but I sat during the course of the trial and I said to
24 Mr. Sparber, I think the verdict of the jury was correct
25 here and I do think the verdict of the jury was correct.

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2 You heard me ask Mr. Davis whether when
3 he said you were not guilty he meant that you had not
4 committed the acts the indictment said you committed or
5 whether he meant that that was not legally a crime and
6 he said he meant both.

7 I don't think there is any question about
8 the fact that you committed the acts that are stated
9 there. The evidence was pretty heavy with taped conver-
10 sations and so on and I do think --

11 THE DEFENDANT: When you have a deal with
12 an animal like that, Judge, you would have done the
13 same thing.

14 THE COURT: That may be so, but I didn't
15 and the law says that that is an offense.

16 You did hear me say that I think Mr. Napoli
17 is a bum. You did hear me say I think he is a thief
18 and I have got all that very much in mind but, Mr. Bufalino,
19 you know, we have police in our society. If somebody
20 gets ripped off or if a friend of somebody gets ripped
21 off you don't have to go around threatening him the way
22 that you did and threatening to kill and so forth.

23 Against you is the nature of the offense
24 as it was with Mr. Sparber. Putting it politely, a crass
25 effort to collect credit by extortionate and threatening

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10

2 means.

3 Moreover, in my view, you are obviously
4 in charge of the enforcement procedure and you also
5 unquestionably threatened to kill Mr. Napoli. I know
6 sometimes in the heat of passion that can be stated
7 innocently but I think you were intending to threaten
8 Mr. Napoli. He was the person to whom the credit had
9 been extended and I believe it was credibly established
10 that you assaulted him by kicking him.

11 Moreover, the record of this case in my
12 view logically reaches the conclusion that Mr. Jacobs
13 and you were fencing diamonds or dealing in stolen
14 diamonds since otherwise I can't see why you wouldn't
15 have gone to the police to correct the debt from that.

16 In your favor is the fact that you have,
17 as Mr. Davis says, no prior convictions against you.
18 I made the comment that you have been convicted and
19 conviction was reversed. In my mind that is a different
20 state of affairs than having no prior convictions but
21 legally you have no prior convictions. There is no
22 question about it.

23 Also, you are a man of advanced years and
24 I know that you are not in good health. You have diabetes,
25 you have eye trouble and I think you also have some trouble

1 qjw 11

2 with your back and I sympathize with that because from
3 time to time I have it myself.

4 Many letters have been written in your
5 favor and I am prepared to believe that the writers of
6 those letters consider you a good citizen. You certainly
7 have contributed money, time and energy to many good
8 causes but some people do that and yet are responsible
9 for other acts.

10 You are a good family man. You have been
11 married I believe almost fifty years and your wife is
12 devoted to you and I have no reason to believe that there
13 is any reason why she shouldn't. But nevertheless,
14 I feel that the offense here is a heavy offense.

15 It seems to me that the combination of using
16 force to collect a debt and of the background of dealing
17 in stolen goods is too serious to be overlooked. I don't
18 like the idea of depending in this sentence on what
19 people have said which hasn't been proven although I
20 would be less than candid if I said that anybody can
21 completely disregard the fact that there are very strong
22 reports, Mr. Bufalino, that you have been connected with
23 organized crime all your life.

24 However, I have done my best to eliminate
25 any such reports as a basis for the sentence which I am

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2 about to impose.

3 It is therefore adjudged that on Count 1
4 the defendant be committed to the custody of the
5 Attorney General or his authorized representative for a
6 period of four years and is fined the sum of \$10,000 to
7 be paid within ninety days or the defendant to stand
8 committed.

9 On Count 2 execution of sentence is suspended
10 and the defendant is placed on probation for a period
11 of five years to commence upon the expiration of the term
12 of custody and the defendant is fined the sum of \$10,000
13 to be paid within ninety days or the defendant to stand
14 committed.

15 Mr. Bufalino, as you heard me tell Mr.
16 Sparber, you have a right to appeal from your conviction.
17 You have a right to appeal therefore from the sentence
18 which I have imposed.

19 If you cannot afford to file the notice of
20 appeal yourself I will order the clerk of the court to
21 do so. From what little I know of your finances I
22 believe, however, that you have the ability to file that
23 notice of appeal.

24 I assume, Mr. Davis, that Mr. Bufalino
25 will appeal the conviction.

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2 MR. DAVIS: That is right, your Honor.

3 THE COURT: Now we have the question of
4 remand and I suppose I know what Ms. Jones wishes to
5 do but I will hear what the government has to say.

6 MS. JONES: The government does ask for
7 a remand with respect to Mr. Bufalino for three reasons.

8 First of all, we would ask this Court to
9 credit the reports of persons who are now relocated
10 witnesses for the government with respect to Mr. Bufalino's
11 ongoing criminal activities and to consider that Mr.
12 Bufalino is a present threat to the community.

13 Both because of those reports and also
14 because of the crime which he has now been convicted of
15 and sentenced for.

16 Secondly, your Honor, he does now face a
17 substantial period of incarceration and I think that the
18 likelihood of flight at this moment has increased. Mr.
19 Bufalino, as it is, travels quite freely between
20 Pennsylvania, Kingston, New York City and Florida and
21 I see no reason why Mr. Bufalino could not flee. He
22 certainly has the resources.

23 No. 3, I think that in this instance this
24 appeal is being taken solely for the purpose of delay.
25 Your Honor was the trial Court Judge and in the government's

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2 opinion, which of course is always our opinion, I suppose,
3 there is no serious reason or serious issue on appeal
4 in this case.

5 I would ask your Honor to consider all
6 three of those reasons very seriously.

7 THE COURT: Mr. Davis, do you want to
8 answer those points?

9 MR. DAVIS: I sure do, your Honor.

10 I am most surprised to hear Ms. Jones make
11 the statement she has about Mr. Bufalino fleeing. Mr.
12 Bufalino has always made himself available to the Court
13 and has been available when required. He never took a
14 trip to Florida unless I personally notified Ms. Jones
15 that he was making a trip and where he was going to be.

16 In my discussion with Ms. Jones only a
17 week ago in connection with the presentence report, Ms.
18 Jones said to me does he want to be deported. Mr.
19 Bufalino does not want to go away. He wants to stay
20 here.

21 This has been his life, your Honor. He has
22 a good family, a beautiful wife, a devoted wife. He is
23 respected in the community. He has worked hard for the
24 community. He has a stake in the community. He doesn't
25 want to run away, Ms. Jones.

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2 THE COURT: Don't take it personally.

3 MR. DAVIS: Actually I am addressing
4 you, your Honor, but I am referring to Ms. Jones.

5 He has always made himself and will make
6 himself available. In addition to his having a meritorious
7 appeal I have in front of me a very recent case and I
8 was going to call it to your Honor's attention but I
9 didn't feel it necessary until we got to the appeal, but
10 since Ms. Jones says there is no issue here for appeal,
11 I refer your Honor to the case of Krauss v. Rose which
12 was decided on September 12, 1977 which has to do with
13 influence upon a jury and a Court questioned the jury
14 without the presence and assistance of counsel.

15 We have a very meritorious appeal here
16 and we have other issues and I say this to your Honor:
17 Mr. Bufalino, I only met him several years ago. But I
18 can tell you and I speak from my heart when I say this,
19 Mr. Bufalino will not flee. Ms. Jones knows he is not
20 going to flee. Mr. Bufalino is no threat to anyone
21 and I ask your Honor to continue him on bail as you have
22 done because if he was going to flee he could very well
23 have fled before today.

24 Thank you, your Honor.

25 THE COURT: Although I think the government's

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2 request must be more seriously considered in this case
3 than in some others, I nevertheless will allow Mr.
4 Bufalino to remain on bail pending appeal for the follow-
5 ing reasons:

6 First, I think that the possibility of
7 flight while it always exists is limited. Mr. Bufalino's
8 record has been good. So far as I know there wasn't
9 even a complaint that he attempted flight after he was
10 convicted by this Court on one prior occasion pending
11 appeal and I think that was a five year sentence in that
12 case.

13 Secondly, I am persuaded that his relations
14 with his family and community are such that he would
15 want to stay.

16 I am concerned about how Mr. Bufalino
17 will be spending his time pending appeal. For that reason
18 I am going to require as a condition of continuing on
19 bail, since I understand that he comes to New York
20 regularly, that he report, am I correct in understanding
21 Mr. Bufalino comes here every week?

22 MR. DAVIS: He earns a living here, your
23 Honor.

24 THE COURT: That he report to his probation
25 officer once a week at the time to be specified by the

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probation officer so that the probation officer can keep
in touch with him and know how he is getting along.
That is the only condition that is imposed in addition
to whatever conditions exist already.

MR. DAVIS: Thank you, your Honor.

THE COURT: Ladies and gentlemen, that
concludes the proceedings.

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Due and timely service of Two copies
of the within APPENDIX is hereby
admitted this 19TH DAY OF DECEMBER 1977

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Attorney for APPELLEE

M. Rothberg
Sey. Appellate Section
12/14/77